

OPINIONS
OF THE CORPORATION COUNSEL
AND ASSISTANTS



CHAMPLIN-SHEALY COMPANY, CHICAGO



OPINIONS

OF THE

CORPORATION COUNSEL

and ASSISTANTS



CITY OF CHICAGO
DEPARTMENT OF LAW

APRIL 15, 1929 to DECEMBER 31, 1935

Edited and Compiled by
BARNET HODES
CORPORATION COUNSEL



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PREFACE

Among the volumes of Opinions of the Corporation Counsel and Assistants published by the Chicago Department of Law, this volume unquestionably is unique. This is stated not by way of attempting to estimate beforehand the value of the material or the manner of its presentation, but simply as a fact.

A cursory glance will show that a definite departure from the traditional procedure has been made in this work. It is so definite that persons who value tradition for tradition's sake may be shocked at first glance. It is believed, however, that the practical value of the innovations in the long run will appear so persuasive as to overcome possible objections from even those who might oppose any procedure that lacks the sanction of tradition, particularly in the field of law.

Even in the period of time covered—April 15, 1929 to December 31, 1935—there appears a significance which seems to lift this volume out of the ordinary. The period has been an extraordinary one, coinciding almost exactly with the development, the climax and, it is hoped, the decline of the "great depression." The depression created almost unprecedented stress and strain for all governments, including the city, and its impact will be found reflected clearly in this volume. As examples, there are the legal opinions on the city's relationships with such new government bodies as the Public Works Administration, the Illinois Emergency Relief Commission and other agencies which grew out of efforts to cushion the depression shocks.

This volume is unique, too, in that *all* legal opinions rendered by the Department of Law of the City of Chicago during this exceptional period are represented in this volume. They are represented by reproduction in full (or nearly so), by carefully prepared synopsis, or by notation. Thus, this volume is a complete record, something none of the other volumes were. Here the whole story, in a manner of speaking, of Chicago's manifold and often difficult legal problems from 1929 to 1936 is told.

What results, when the opinions are taken as a whole and presented as they are in this volume, is a mosaic picture of the actual operation of a metropolitan city government, a picture difficult to find as accurately and definitely anywhere else. This fact in itself would seem to give this work a special value, and a very real one,

not only to lawyers but to students of government and the average citizen.

The completeness of the picture of Chicago's government contained in this volume arises from the nature of the duties of the Department of Law. Scarcely a function of city government may be imagined which does not at some point produce the necessity for clarification or interpretation of its legal basis and this is a major task of the department. In one day the Department of Law might be called upon to deal with problems of the Chief Executive, the City Council, the Police Department, the Fire Department, the Water Bureau and so on through the entire directory of the City Hall. The legal opinions which result are, therefore, direct reflections of all the functions of the city and taken together, they give a complete view of the city in action. Such a whole view in a realistic fashion is made possible, doubtless for the first time, by this volume.

More striking, however, than the foregoing aspects is the manner of presenting here the vast opinion product encompassed. A wholly new concept of the purposes which such a volume could be made to serve underlies the scheme of presentation followed. In brief, this concept is that the published opinions of the Chicago Department of Law could be more—much more—than a mere collection of legal papers, a "legal filing system" in fact; but rather that they could be shaped into a continuously useful, day in and day out, legal guide for the lawyers in the employ of the city, for the city administrators and the non-legal as well as the legal public.

This can be done, it is submitted, through planned organization of the material and by other techniques which show with proper emphasis the relationships which particular opinions may have upon real, actual city problems. Plainly, this could not be done by the old procedure of merely assembling a group of opinions and placing them in chronological order in a book just as they were written, with many of them concealing a kernel of permanent value in a discussion of factual detail, a great number essentially duplicates of each other, and others likely to be of no more than historical interest, if that, albeit filling pages and pages of type. Certainly lawyers recognize the obvious shortcomings of the old method. As for the non-legal public, a fair question is whether the layman, or even the non-legal administrator, bothered to use the old books at all.

Incidentally, this concern for the non-legal public in a work of this nature may appear strange to some. But it is my opinion that every possible means of encouraging general public interest, and enlighten-

ment, with regard to the legal problems of the city should be utilized. If municipalities are sometimes legally "hamstrung"—as they are—the apathy of the public, springing from lack of knowledge as to the facts, may be largely to blame. The facts must be gotten to the public some way, for it is the layman who must act eventually.

The question of home rule is probably a good example in point. It has been clothed in legal mystery and very often so obscured by legal phrases and generalities that the citizens, who might bring remedial action if they knew what the problems were, are left entirely in the dark. It is a definite part of the concept behind this volume to make these problems understandable to the average citizen by presenting the actual cases of legal restrictions upon the city, of which many will be found between the covers of this book, and that in a manner the layman will comprehend.

It remains to be seen, of course, whether the goal of this concept has been attained. It should be reckoned, incidentally, that if experience indicates a better procedure for the future, there will be no hesitation on the part of the present Corporation Counsel to make the change. This, because it is my view that governments generally should be flexible enough to conform to changing conditions and better methods, that, indeed, they must change if they are to properly fulfill their functions, and I see no reason to exempt this particular function from that philosophy of government.

In passing it may be stated that there is a relationship between the concept underlying this work and the fact that the Department of Law of the City of Chicago has been undergoing a modernization process as a whole. The department has been consolidated and coordinated. Where formerly there were six virtually autonomous legal agencies—the office of the corporation counsel, city attorney, city prosecutor, water attorney, attorney for the board of local improvements, fire attorney—there is now a single department for the city under the central direction of a single executive head. This was achieved upon the basis of an ordinance adopted August 2, 1935, at the suggestion of the present incumbent.

When the task of publishing the opinions was approached, in the reorganization spirit, the first fact considered was that none had been published since April, 1929, nearly seven years. There was no question as to the desirability of carrying on the procedure of publishing opinions in some fashion. The value of having past opinions in book form had long been established. Without them, the Department of Law itself was seriously handicapped. Moreover, the legal profes-

sion generally found them, even in the old form, valuable, and many members of the bar had indicated they felt the lack caused by the temporary lapse in publication.

It would have been a simple matter to follow the old procedure of bringing out the opinions as they were written, that is, in full, not infrequently with duplications of thought, and in chronological order. Of course, in that case not one, but several volumes would have been necessary if we were to do justice to the product in following the old procedure. But would that be the best way, from the standpoint of getting the greatest amount of practical utility out of this opinion product? This question was approached, as already indicated, in a spirit of not being content to follow the old procedure merely because it was the old procedure.

We considered that we had here a veritable mountain of vital legal information. What was more important, it was not the ordinary kind of legal information such as would be found in any law library, but of a special type bearing directly upon the problems of the city government of Chicago. The some 2,600 opinions which had piled up since 1929 meant thousands of hours of intensive research and thought upon actual legal problems involving Chicago's government. In terms of what the city spent in salaries and otherwise over the period of nearly seven years, they represented a tremendous dollars and cents investment. Clearly it seemed worthwhile to attempt to enhance the dividends that such an investment might be made to pay to the city.

The period covered by this product appeared long enough, the quantity great enough and the scope of the problems discussed broad enough to make possible a virtually encyclopedic work which would be, in a sense, a textbook on applied municipal law, one of especial pertinence and value to Chicago, its officials, the civic-minded public and possibly to students of municipal government everywhere. To achieve this, meant embarking upon an entirely new plan of organization, and this was done.

Of major significance is the fact that all of the opinions are presented in synopsis, or digest form, although certain ones are also given in full, as will be noted shortly. It will be found not unusual for an opinion which occupied six or seven standard typewritten pages to be presented here in five or six lines, (incidentally, the number of such original pages is given in this volume with each digest). Drastic as this may seem, it is submitted that it will be a rare case

if the digests fail to convey every essential point which makes the opinions worth recording permanently at all.

If certain points of an individual opinion are omitted, these points will be discussed in most cases in digests of other opinions on the same subject—it being part of the plan that a reader familiarize himself with all of the opinion digests bearing upon a particular subject. Moreover, accompanying each digest are the pertinent citations given in the opinions—the cases, statutes, ordinances and general references. This material should be considered a definite part of the digests, not merely something “tacked on.” Through the combination of the digest and the citations, nothing of importance, it is submitted, has been withheld from the original opinion, whereas there has been gained the advantages of brevity, compactness and adaptability to intelligent organization of the material as a whole, not to mention the saving of eyestrain which reading through the full opinions would entail. The citations, of course, will also serve to indicate the research performed in preparation of an opinion and will furnish leads for research by readers themselves.

As stated, certain opinions are also given in full, or nearly so. In this, the procedure would appear to be not unlike the old method of presenting the opinion product. Yet there is a vital added difference here, too. Some of the opinions given fully were selected because of some special significance in themselves, but more generally the selection was determined because these opinions enunciate general, broad principles of law pertaining to a particular subject. They are thus used to give a background to support or clarify the digests of other opinions in the same field while also discussing a particular legal problem. One example of how this scheme works will be found in the first chapter, in the section pertaining to the relationship of the city to the Chicago Park District. (Pages 35-43.) Twenty-one opinions on this topic are recorded in digest form. One of these digests, which happens to be the first (page 35), is accompanied by the original opinion. This opinion was thus singled out, not necessarily because it was a better or more significant opinion than others, but because of its general discussion of the relationship between the city and the park district. In it will be found the general principles which apply to most of the other subjects discussed in the section, thus making it possible and desirable to confine the other digests to specific points. This plan—the opinion on the city’s licensing power, found on page 448, is another good example—has been followed throughout. Incidentally, copies of all opinions recorded here are available in the files of the Department of Law if it should be necessary to refer to them.

It is worth emphasizing, too, that in addition to presenting the opinions in digest form for greater convenience, an effort was made wherever possible to use non-legal terminology, while preserving strict legal meaning and validity. In this, the value of the volume to non-legal readers was in mind. As a possible minor matter along this line, but also to give all readers a better perspective, a special effort was made when cases are cited, to see that the year in which the decision was handed down is given. Not always were the writers of the opinions careful to give the dates of cases, and this lack has been corrected in the editing so that the average reader will be informed as to whether a certain decision is found in the court reports of 1835 or 1935.

As another feature, the opinions are annotated, not completely, it should be admitted, but to an extent that should be decidedly helpful. These annotations—something not attempted with the published opinions before—include references to recent cases, statutes and ordinances, factual circumstances of pertinence, certain qualifying material and cross-references to other opinions. It will not be necessary, of course, to warn lawyers who use this volume that annotation to cover every possible qualifying circumstance was not intended, or of the fact that an opinion prepared as of certain date may be worthless as basis for later action because of a change in the statutes or ordinances.

In connection with opinions based upon ordinances, attention is directed to "The Amendment Guide to Revised Chicago Code 1931, as of August 1, 1936," also published by the Department of Law. This Guide is another indication of the heightened public service this department is attempting to give and shows the changes in the Chicago Code as of its date. The Guide has been used in compiling this volume to note certain important Code amendments, but it is suggested that individual readers also refer to it as a check when interested in opinions which involve the Code.

After the task of digesting and annotating the opinions was completed, the most radical departure of all was made—the actual organization of the material into book form. A glance at the Table of Contents will show what was done.

Instead of being assembled chronologically, as in previous volumes, the material is organized according to subject matter and separated into general sections and chapters. The chapter setup is in accord with a functional analysis of municipal government insofar as the material at hand would permit. The result is an organized, inte-

grated picture of the various phases of municipal government, such as Finance, Licensing or Civil Service. Here again a prime consideration has been the use of this volume for the city administrator, the student of government and the citizen, as well as the lawyer.

One other innovation found in the volume is the introductory statement which prefaces each chapter. These are suggestive of the nature of the opinions in the chapter and also by way of outlining briefly rather than comprehensively either the scope of the municipal function concerned or its historical development. They are not intended to be "legal," but informative. Some of the material in these statements may appear elementary at times to students or experts of municipal government, yet it is believed they will prove of value in tying in the opinions in this book with the realities of municipal life and thus help give some readers a better perspective of the issues involved.

The index appears worthy of comment. An attempt was made to make it most thorough and comprehensive and to meet the criticism that former indexes at times left much to be desired as guides to information sought. Very often, a work of this kind is no more useful than its index, and this has been kept in mind in this volume. As an added convenience, the running heads on the pages of text conform with the material, thus the book is self-indexing, in a sense, for those who "thumb through."

The undersigned wishes to make it clear that while he takes the responsibility for the manner in which this volume is presented, only a minority of the opinions in this volume—those since the date July 22, 1935—were prepared during his incumbency as Corporation Counsel. Thus, the major portion was prepared during the 1931-1935 term of the Honorable William H. Sexton and others under the direction of the Honorable Samuel A. Ettelson in the period 1929-1931. I am happy in behalf of the Department of Law to make this acknowledgment of their work and its relation to this volume, and I am especially pleased to call attention to the prefatory statement which Mr. Sexton was kind enough to prepare and which will be found on a subsequent page.

I beg to acknowledge also in behalf of the Department of Law the contributions of the lawyers now members of the department, or former members, who performed the major portion of the work upon which this volume is based. In the early days of Chicago, the Corporation Counsel, or "Attorney for the City," "Solicitor for the City" and "Counsel to the Corporation," as the legal officer was called at

various times, may have been able to do all of the legal work himself. That condition has long since disappeared. Today, some eighty lawyers comprise the city's legal staff, augmented by a ministerial staff of comparable size.

I am glad to state here, also, that my experience both as an assistant corporation counsel and now as head of the department testifies that these lawyers in the service of the city represent a group who do credit to the bar of Chicago. They go about their tasks for the city with the spirit of a lawyer serving a private client, a spirit which is being encouraged. They are zealous to guard the city's interest, and, while there may be occasional laggards in the ranks, such will be found to be the exception. As often as not, the city lawyer will be found working intensively during the day in behalf of the city and taking home a brief-case of work to be done at night, after hours. I, for one, am glad to pay him this well-earned tribute.

I join, too, in the tribute paid by Mr. Sexton in his prefatory statement to the late Mr. Leon Hornstein, with whom I also worked, whose service as First Assistant Corporation Counsel will be long-remembered, and also to Mr. Joseph F. Grossman, the present First Assistant. It is worthy of note that both these men were responsible not only for the vast amount of work which carries their initials in this volume, but also for assistance in supervising and advising other members of the department. This is said without in any way underestimating the services of the other members of the staff, most of whose names will be found listed elsewhere.

I should like, however, to take this opportunity to express appreciation here to the heads of the various main divisions of the department whose cooperation produces unity of departmental operation—Mr. Michael L. Rosinia, head of the Division of Prosecution, Mr. A. M. Smietanka, head of the Division of Personal Injury Litigation, Mr. Arthur A. Sullivan, head of the Division of Local Improvements, and also to Mr. E. J. Kelly, head of the Division of Investigation.

For the actual, and, as is readily comprehended, really tremendous task of carrying through the preparation of this volume, I am happy to state that it represents a major accomplishment of the Research Division established as a new unit in the department as a part of the reorganization program. This division was initially set up by Dr. Albert Lepawsky of the University of Chicago Department of Political Science and author of several works on Chicago local government, now with Public Administration Clearing House.

This particular phase of the Research Division work was in direct charge of Mr. Ralph Burton, research associate, graduate student in political science at the University of Chicago, who went at the task with unusual diligence and competence. He was assisted by the division as a whole, under the general supervision of Mr. Harry Kletzky, and in particular by Miss Esther Oswianza, Mr. Frank Lindman and Mr. Bruce Scott, graduate students of Northwestern University, Loyola University and the University of Chicago respectively.

Many lawyers in the department took time to cooperate in this project, as in reading over the proofs, including Mr. Joseph F. Grossman, Mr. Quin O'Brien, Col. Martin H. Foss, Mr. George F. Mulligan, Mr. Joseph J. Sullivan, Mr. Earle Downes, Mr. William V. Daly, Mr. Charles P. Horan, Major Adam E. Patterson, Mr. Oliver W. Holmes, Mr. Edmond L. Mulcahy and others.

It is not customary to dedicate a work of this nature, but if there were a dedication it assuredly would go to His Honor, Mayor Edward J. Kelly. His interest made possible the consolidation and reorganization of the Department of Law to secure heightened benefits for the public and it is his constant insistence that every department give the greatest possible service. This is the real inspiration for the good it is hoped this volume will accomplish.

BARNET HODES,
Corporation Counsel.

October, 1936.

Prefatory Statement by the Hon. William H. Sexton

It was a matter of great regret to me that I left the office of Corporation Counsel on July 22, 1935, without having published some of the more important opinions rendered by the Department of Law during my incumbency which began on June 10, 1931. Owing, however, to the necessity of strictly curtailing the expenses of operation, it was not deemed advisable to do so during those years.

I am gratified that my distinguished successor, Mr. Barnet Hodes, is now publishing the opinions, thereby preserving the continuity of the published opinions beginning with the volume issued in 1897.

It is also a great pleasure for me here to record my deep appreciation of the services rendered by the staff of the Department of Law during my last administration.

In closing, I particularly acknowledge the able and faithful services of the late Mr. Leon Hornstein, who died in office after a long and honorable career in the city law department, and of Mr. Joseph F. Grossman, who succeeded him as first assistant corporation counsel.

WILLIAM H. SEXTON.

October, 1936.

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EXPLANATORY NOTES AND DATA

KEY TO CITATION ABBREVIATIONS

The City Code has been cited as in the following examples:

Code '22: 629, 701 refers to sections 629 and 701 of the Chicago Municipal Code of 1922.

Code '31: 407-411 refers to sections 407 to 411, inclusive, of the Revised Chicago Code of 1931.

The revised Illinois statutes have been cited as in the following examples:

Cah. '33, 24: 422a, refers to section 422a and sections 424 to
424-426 426, inclusive, of chapter 24 of Cahill's Illinois Revised Statutes of 1933.

ISBS '35, 24: 605(1-4), refers to sections 605(1) to 605(4), in-
714 inclusive, and section 714 of chapter 24 of
the Illinois State Bar Association's Illinois Revised Statutes of 1935.

SH '31, 24: 65(.67-.70, refers to sections 65.67 to 65.70, inclusive,
.73), 214-216, 401 section 65.73, sections 214 to 216, inclusive,
and section 401 of chapter 24 of Smith-
Hurd's Revised Illinois Statutes of 1931. .

* * * * *

Cah	Cahill's Illinois Revised Statutes
CJ	Corpus Juris
Code '05	Revised Municipal Code of Chicago of 1905
Code '11	Chicago Code of 1911
Code '22	Chicago Municipal Code of 1922
Code '31	Revised Chicago Code of 1931
Const.	Constitutional
Coun. J.	Journal of the Proceedings of the City Council of Chicago
Hurd	Hurd's Revised Statutes of Illinois
ICC Reports	Interstate Commerce Commission Reports
Ill. Laws	Laws of the State of Illinois
ISBS	Illinois State Bar Association's Illinois Revised Statutes
Ill. Stat. Ann.	Smith-Hurd's Illinois Annotated Statutes
Mun. Corp.	Municipal Corporations

Mun. Ord.	Municipal Ordinances
Op. Corp. Counsel	Opinions of the Corporation Counsel of Chicago
Op. Ill. Atty. Gen.	Opinions of the Attorney-General of Illinois.
Op. State's Atty.	Opinions of the State's Attorney of Cook County
Op. U. S. Atty. Gen.	Opinions of the Attorney-General of the United States
ord.	ordinance
SH	Smith-Hurd's Revised Illinois Statutes
Sp. sess.	Special session
Spec. Ord.	Special Ordinances
USCA	United States Code Annotated
US Stat.	United States Statutes at Large

DATA GIVEN WITH REPORTED OPINIONS

Above each opinion reported in this volume there is printed in *italics* the number of the opinion, the office or officer to whom the opinion was written, the initials of the Corporation Counsel or Assistant Corporation Counsel who wrote the opinion, the date of the opinion, and the length of the opinion in standard typewritten pages.

When the office or officer to whom the opinion was written is not indicated, the opinion was addressed to a person having public business with the city who was not a government official.

NUMBERING OF OPINIONS

The numbering of the opinions is a continuation of the chronological sequence of the previous volume, but the arrangement of the opinions is according to their subject matter.

For reference convenience, a table of the opinion numbers with corresponding page numbers is given in this volume at page 943.

REFERENCES TO OPINIONS NOT INCLUDED, BUT NOTED

An annotation to an opinion digest which states, as in the case of Opinion No. 8921, page 5, "Opinion No. 7188 * * * is in accord with the above opinion" indicates that Opinion No. 7188 has not been included in the volume because it is substantially the same as

the opinion that is recorded and the fact is recorded solely for sake of completeness.

An annotation to an opinion digest which states, as in the case of Opinion No. 8739, page 21, "Opinion No. 6509 of September 16, 1929, and No. 6609 of March 1, 1930 * * * discuss the same point as the above opinion" indicates that the opinions thus noted give an interpretation which has been revised. Such opinions are not otherwise recorded in this volume.

This information is given for its value to the city officials and employees concerned, and for sake of completeness and so that the Department of Law will have a permanent record of all opinions rendered.

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SECTION I

INTERGOVERNMENTAL RELATIONS AND MUNICIPAL ORGANIZATION

CHAPTER I

RELATIONS WITH OTHER GOVERNMENTAL JURISDICTIONS

INTRODUCTORY

Chicago, like all other large metropolitan cities, has innumerable relationships with other governmental jurisdictions, and this fact adds to the complexities of municipal government. The types of government with which it has contact include the federal government, the state, the county, adjoining municipal governments, and various special forms of municipal corporations such as park districts and sanitary districts. The types of relationship range through such questions as the power to tax each other, the control of one over the other, the limits of jurisdiction of each within the same territories and the powers of cooperating one with another.

Particularly unique relationships with the federal government, as in relief and public works, have arisen in recent years. There are also the ever-present problems of the city's police powers over federal officers and property, the federal government's taxing powers over city property, and similar problem relationships.

As for the state, the city is in the legal position of a creature and subordinate. This status continually manifests itself not only in the opinions contained in this chapter but in various opinions occurring throughout the volume. The city acts only in so far as the state has given it the power to act and this delegated power itself is subject to recall at the will of the parent state.

In its relations with adjoining municipalities, the city finds itself confronted with common problems of a contiguous metropolitan population over which several municipal jurisdictions operate. Thus, for example, the water supply of most of the adjoining municipalities is obtained through the City of Chicago as a primary source, but it is supplied to the consumer through the individual municipalities. Past history has seen considerable elimination of this separation of jurisdiction through the process of annexation. Recent years have brought scattered efforts at cooperation, such as the establishment of telephonic communications between the police departments of the contiguous municipalities.

Chicago is not only concerned with relationships with adjoining city governments, but also with problems of relative power and jurisdic-

tion in dealing with the territorially overlapping local governments. We have, for instance, the question of relative police powers of the Chicago Park District and the City of Chicago, both having jurisdiction in the same area. Then, too, there are problems of taxation and finance, public works, local improvements and the like when the city comes in contact with Cook County, the Chicago Park District, the Sanitary District or the Board of Education.

The opinions contained in this chapter give an excellent picture of the extent and character of Chicago's dealings with other governmental authorities. They show strikingly the complexities of metropolitan governmental operation in relation to other governments.

A. RELATIONS WITH FEDERAL GOVERNMENT

(1) *Police Regulation*

CONSTRUCTION OF FEDERAL BUILDINGS WITHIN CITY

(No. 7070—*Commissioner of Buildings—J. F. G. and L. H.—August 12, 1931—3½ pp.*)

Where the federal government acquires land in a state with the consent of the state legislature, it has exclusive jurisdiction over the land, but when it is acquired without that consent, the federal government's rights in the premises are the same as if it were a private owner. In the latter case, to build on those premises in the city, the federal government must take out a building permit and comply with the city ordinances regarding the approval of building plans. When the building is completed and occupied for the purposes of the federal government, the jurisdiction of the federal government within the building will be exclusive.

Citation:

Case: *Fort Leavenworth Railroad Co. v. Lowe*, 14 U. S. 525 (1885).

Federal Acquisition of Land: By early act the state has given its consent to the acquisition by the United States of any Illinois land for governmental purposes.—ISBS '35, 143:10.

JURISDICTION OVER UNITED STATES PROPERTY

(No. 8921—*Deputy Acting for the Mayor, Department of Buildings—O. F. W.—November 8, 1935—3½ pp.*)

The jurisdiction of the city and state, where property owned by the United States government and used for governmental purposes is concerned, is confined to arresting criminals and serving process.

Citations:

Statutes: ISBS '35, 143: 10, 11, 12.

Case: *Egan v. Chicago*, 5 Ill. App. 70 (1880).

Opinion No. 7188 of October 15, 1931, to the Commissioner of Buildings is in accord with the above opinion.

CIVIL WORKS ADMINISTRATION WRECKING PROJECTS

(No. 8281—*Deputy Acting for the Mayor, Department of Buildings—C. N.—January 24, 1934—2 pp.*)

In the case of a Civil Works Administration project for the wrecking of houses, the Department of Buildings must enforce the code provisions, and any cooperation given this project must come in the form of revisions of the City Code by the City Council. Unless the

city itself undertakes to enter upon the work of wrecking buildings, any such enterprise must be deemed a private one and governed by code requirements.

Citations:

Ordinances: Code '31: 407-411, 1197-98.

**CIVIL WORKS ADMINISTRATION—INDEMNITY FOR
WRECKING DAMAGE**

(No. 8308—*Deputy Acting for the Mayor, Department of Buildings—C. N.—February 20, 1934—2 pp.*)

It is the duty of the Department of Buildings to treat the Civil Works Administration wrecking project in the same manner as it would treat a property owner who desires to wreck a building, and it should require that the Civil Works Administration indemnify the city for any form of mishap which might occur.

Citation:

Ordinance: Code '31: 1197, as amended, Coun. J. (1933-34), p. 1507.

**CIVIL WORKS ADMINISTRATION PERMITS FOR WRECKING
BUILDINGS**

(No. 8466—*Deputy Acting for Mayor, Department of Buildings—J. F. G.—July 12, 1934—1½ pp.*)

The Department of Buildings is authorized to issue a permit to a licensed wrecking contractor designated by the Civil Works Administration for the demolition of structures listed by the Illinois Emergency Relief Commission, if the permit bears a statement that it was issued without payment of a fee, provided that the contractor has furnished a bond of indemnity to the city.

Citation:

Ordinance: Code '31: 1197 as amended Feb. 7, 1934.

CHICAGO RIVER FIRE REGULATIONS*

(No. 8795—*Acting Fire Commissioner—C. N.—June 12, 1933—3 pp.*)

The Fire Department and the Harbor Master are without specific authority to regulate or prohibit the transference at the mouth of the Chicago river of gasoline through pipes from tank cars to large boats. The federal government should be notified and requested to take such action as may be deemed desirable.

The city's police powers over navigable waters within its jurisdiction do not include fire regulation.

Citation:

Reference: Op. Corp. Counsel (1924-25), p. 749.

*See also Opinion No. 8865, p. 685.

COMPULSORY UNEMPLOYMENT INSURANCE BY CONGRESS

(No. 7813—*Chairman, Committee on Unemployment—M. H. F.—November 22, 1932—1½ pp.*)

Congress has no power to pass general legislation providing for compulsory unemployment insurance.

CONTROL OVER GOODS IN INTERSTATE COMMERCE

(No. 7035—*C. J. A.—July 30, 1931—2 pp.*)

If orders taken in this state for goods to be shipped from another state are sent to such other state for acceptance before becoming a binding contract and the goods are shipped under and by virtue of this contract, this constitutes interstate commerce with which neither any state nor any municipality thereof has any right to interfere.

If goods are shipped from another state to this city unsold, and thereafter sold here, the latter sale is a local transaction subject to the regulations of the local city ordinances.

Citation:

Case: *Robbins v. Shelby County Taxing District*, 120 U. S. 495 (1887).

**VEHICLE LICENSES FOR FEDERAL EMPLOYEES
OR VEHICLES**

(No. 7802—*M. H. F.—November 7, 1932—2 pp.*)

Vehicles privately owned by federal employees who are residents of the city, are subject to the provisions of the city's wheel tax ordinance.

Vehicles which are property of the United States and operated on the streets of the city by the Lighthouse service are not subject to the city's wheel tax ordinance.

Citations:

Ordinances: Code '31: 2063, 2073.

VEHICLE LICENSE FOR CONTRACTOR FOR UNITED STATES

(No. 7945—*Commissioner of Public Works—Jud. G.—February 16, 1933—3 pp.*)

Trucks owned and operated by the federal government are not subject to city license fees.

The ownership and not the use of the property or truck determines whether it is taxable or subject to a license.

A Chicago contractor who owns trucks operating in the streets of

Chicago is required to take out vehicle licenses, even though the trucks are used in fulfilling a contract to haul mail or merchandise for the government.

Citations:

- Cases:** People v. United States, 93 Ill. 30, 38 (1879).
 Johnson v. Maryland, 254 U. S. 51 (1920).
 Fagan v. Chicago, 84 Ill. 234 (1876-77).

FREE VEHICLE LICENSE TO UNITED STATES EMPLOYEES

(No. 8168—Mayor—M. H. F.—September 7, 1933—5 pp.)

Officials of the city cannot issue gratuitously city vehicle license tags to privately owned vehicles of members of the United States Coast Guard or the Bureau of Customs, unless an ordinance allowing this issuance is passed by the City Council.

Citations:

- Ordinances:** Code '31: 2073.
 Coun. J. (1932-33), p. 2166.
Other reference: Op. Corp. Counsel (1920-23), p. 493.

(2) Finance

EXPENDITURE OF FEDERAL FUNDS GRANTED CITY

(No. 8215—Mayor—L. H.—November 15, 1933—6½ pp.)

When the city takes actual possession of money secured from the federal government by putting the funds in its treasury, these amounts can be withdrawn only on warrant and can be expended only in accordance with the appropriations in the annual appropriation bill.

Lump sum appropriations for a particular class of work or improvements are proper, if nothing inconsistent with the appropriations is inserted in the annual appropriation bill.

If it is required as a condition to securing federal aid that the persons who are to perform the labor be selected in a manner prescribed by the federal government, and these persons are put on such work for more than sixty days, there probably will be difficulty about their employment in so far as it conflicts with the Civil Service act and regulations. For periods not exceeding sixty days, it is probable that these persons can be lawfully employed on the theory that an "extraordinary exigency" exists.

Citations:

- Statutes:** Civil Service act, sec. 10.
Cases: People v. Sergel, 169 Ill. 619 (1897).
 Koelling v. People, 196 Ill. 353 (1903).
 Otis v. People, 196 Ill. 542 (1902).
 People v. Clark, 296 Ill. 46 (1921).
 Chicago, Peoria, and St. Louis Ry. v. People, 225 Ill. 463 (1907).
 People v. Millard, 307 Ill. 556 (1923).
 People v. Day, 277 Ill. 543 (1917).

OPINION OF FOREGOING SYNOPSIS

In view of the possibility of the city receiving some money from the federal government to pay for certain work contemplated for the year 1934 some questions have arisen with respect to the methods to be employed in the matter of appropriations and expenditures from such funds. Three questions relating to these matters have been asked, which we answer below, as follows:

(1) Even if the funds are secured from the federal government, can the city pay for the required labor out of such funds without an appropriation in the annual appropriation ordinance?

The answer to this depends on whether the money in question finds its way to the city treasury. If it is used without the intervention of any act of disbursement on the part of the Comptroller or Treasurer it cannot be said to have actually come into the possession of the city. On the other hand, if the money comes into the actual possession of the city by being placed in its treasury to be used in the payment of the city's obligations for salaries and wages or otherwise, it cannot be disbursed in any other way than as the statutes prescribe for all other city money.

The leading case on this point is *People ex rel. Chadwick v. Sergel*, City Treasurer, 169 Ill. 619, which seems to have definitely settled this question. In that case Chadwick undertook to compel the City Treasurer to pay him certain sums said to have been earned by him for which there was no appropriation in the annual appropriation bill. The theory of the superior court, which ordered a writ of mandamus to issue commanding the treasurer to pay, was that the money in question was payable out of miscellaneous receipts not raised by taxation and that the statutory requirement of an antecedent appropriation in the annual appropriation bill related only to monies raised by taxation. The Supreme Court, however, reversed the decision of the superior court and held that the statutory provision in question related to all city funds whether raised by taxation or otherwise. While the fund in that case was not from the federal government, nevertheless the decision has always been regarded as conclusive on the city's officers with respect to the water fund, the special assessment fund and all of the miscellaneous funds. With respect to bond funds, these are sometimes regarded as exceptions, but only because the same court has held that the passage of a bond ordinance and its approval by the voters is in itself an appropriation that has the same force and effect as an appropriation duly made in the annual appropriation bill. (*People ex rel. Stuckart v. Day*, 277 Ill. 543.)

We are therefore of the opinion that when the city reduces the federal government's money to actual possession by putting it in the treasury it can only withdraw it on warrant duly drawn and can only expend it in pursuance of the appropriations in the annual appropriation bill.

(2) Can lump sum appropriations be made "for repairing streets as required" or "for painting bridges," etc., from which materials may be purchased for that purpose and from which payment of wages for labor incident thereto may be made, so that a part of such appropriation may be saved if the city can get money from the government for such labor?

It would seem that lump sum appropriations for a particular class of work or improvements are proper if there is nothing inconsistent therewith inserted in the annual appropriation bill. It has been customary to place certain general provisions in the first few sections of the annual appropriation bill which would negative the intention if they were inserted in the appropriation bill which carries appropriations of the kind indicated. If such general provisions do not interfere the appropriations can be made as indicated.

As authority for this view we point to the case of *Koelling et al. v.*

People, 196 Ill. 353, where the court held with respect to school taxes (the objects and purposes for which must be specified the same as in the case of city taxes) that if the appropriation ordinance and the ordinance levying the tax for school purposes each provide for specific sums of money under two separate headings, one for new buildings and sites and the other for educational purposes, it is not necessary that the ordinances should separate into items the amounts required for new buildings and for sites, nor specify the items for educational purposes. In the same volume (196 Ill.) will be found the case of *Otis vs. People*, which holds that the appropriation ordinance and the tax levy ordinance are sufficiently definite if they specify the amounts required, respectively, for "building purposes" and for "educational purposes."

There are other decisions of our Supreme Court which indicate that the Council would be within its rights if it made such appropriations as are proposed in the above Question (2). Thus, it was held, in *People v. Clark*, 296 Ill. 46, that where a levy for "maintenance and operation" was made for the Municipal Tuberculosis Sanitarium it was for one purpose and complies with the requirement for itemizing. In the case of *Chicago, Peoria & St. Louis Ry Co. v. People*, 225 Ill. 463, it was held that where the ordinance does not contain a list itemizing the amount levied for each purpose, but sets out the details so that the amounts may be computed, the law is fully complied with. This case is important because it shows that the court applies its ruling in the school board case of *Otis v. People* to city appropriations as we have indicated above it should be applied. The case of *People v. Millard*, 307 Ill. 556, is also illuminating. * * *

From the above we feel that we are safe in saying that such lump sum appropriations as are indicated in Question (2) may properly be made.

(3) In case it is required as a condition to securing federal aid that persons to perform the labor shall be selected in the particular manner required by the emergency administration, can such persons be used in lieu of those on the civil service eligible lists?

There can be no such thing as a categorical answer to this question. If the employees to be put on such work are to remain on the pay rolls of the city for more than sixty days there will probably be difficulty about their employment in so far as it conflicts with the civil service law and regulations. For periods not exceeding sixty days it is probable that these can be lawfully employed on the theory that an "extraordinary exigency" exists, under the following provision of the Civil Service act (section 10):

"To prevent the stopping of public business, or to meet extraordinary exigencies, the head of any department or office may with the approval of the (Civil Service) Commission make temporary appointment to remain in force not exceeding sixty days, and only until regular appointments under the provisions of this act can be made."

The officers of the city, in making appointments of this kind, must be careful to avoid any political preferences, and must prepare themselves to disprove allegations to the effect that such appointments were made for political purposes. The question of good faith in such matters is the determining factor when a charge of this kind is made in the courts.

It will thus be seen that to a limited extent it will be possible to follow the requirements of the federal emergency administration but if pursued to the extent of coming in conflict with the civil service law complications will undoubtedly arise. Under civil service rules existing at present no competitive entrance examination is required for the employment of laborers in unclassified positions, but this relates only to unskilled labor.

**INVESTMENT OF RECONSTRUCTION FINANCE CORPORATION
LOANS TO CITY**

(No. 7922—Mayor—J. F. G.—February 1, 1933—1½ pp.)

Funds of the city obtained from the Reconstruction Finance Corporation cannot be invested in tax anticipation warrants or other city obligations. The funds are subject to deposit, investment and use only in the manner designated by the resolutions of the board of directors of the corporation.

**RECONSTRUCTION FINANCE CORPORATION LOAN TO CITY—
LIABILITY OF TREASURER OR COMPTROLLER**

(No. 8341—City Comptroller—L. H.—March 26, 1934—3½ pp.)

Although a Reconstruction Finance Corporation loan to the city requires a bank to provide collateral to be a depository for the loan, a United States Supreme Court decision prevents this and so long as the City Comptroller and Treasurer commit no acts or omissions jeopardizing the funds, no liability for the safety of the loan will attach to these officers.

Citation:

Reference: Coun. J. (1932-33), p. 3219.

**ACCESS TO FEDERAL TAX RECORDS FOR LOCAL TAX
PURPOSES**

(No. 7002—Chairman of Committee on Efficiency, Reorganization and Consolidation—C. J. A.—July 11, 1931—2 pp.)

The Board of Review and the Board of Assessors, in connection with local taxes, may obtain access to the income tax records of the United States government, if the Chicago City Council and the Illinois Governor apply for a presidential order.

Citation:

Statutes: USCA, Title 26, ch. 19, sec. 1068-87(a, c).

FEDERAL EXCISE TAX ON CITY PURCHASES

(No. 8067—Superintendent, Bureau of Central Purchasing—L. H.—May 18, 1933—2 pp.)

The city, as a consumer, must pay a federal excise tax which is levied on manufacturers, producers, or importers, and which they pass on to the consumers.

The city must pay federal excise taxes levied directly on consumers

only in the case of purchases made by it in its private corporate capacity, but not on purchases made by it in its governmental capacity.

Citation:

Reference: 1 Cooley, Taxation (2nd ed.), p. 133.

NOTE CONCERNING FEDERAL EXCISE TAX

Opinions on federal excise taxes should be interpreted in the light of the following:

Federal Excise Tax on City Purchases: The distinction between goods purchased for "essential governmental functions" and those for so-called "non-essential governmental functions" as a basis for imposing the federal manufacturer's excise tax was abolished in 1935. Formerly, the city was subject to the federal tax on all goods purchased for "non-essential governmental functions" and in any event, when commodities were not bought directly from the manufacturer. By this recent amendment, all purchases for the exclusive use of the city, either from manufacturer or retailer, are exempt.

Items now tax-free under this amendment include gasoline and lubricating oil, tires and tubes, automobiles and trucks, automobile accessories, radios, mechanical refrigerators, sporting goods, cameras, toilet preparations and matches.—40 US Stat. 1025, ch. 829, sec. 401.

FEDERAL EXCISE TAX ON CITY POLICE AUTOMOBILES

(No. 7003—*City Comptroller—M. H. F.—July 11, 1931—2½ pp.*)

The excise tax levied by the federal government on automobiles purchased by the city for police purposes is invalid and may be recovered.

Citations:

Statutes: U. S. Revenue act (1928), sec. 600, 3228 as amended.

Case: Indian Motorcycle Co. v. United States, 283 U. S. 570, 75 L. Ed. 1277 (1930).

FEDERAL TAX ON CITY'S POLICE RADIO EQUIPMENT

(No. 7800—*Commissioner of Police—M. F. M.—November 5, 1932—2½ pp.*)

The federal government may not tax the sale of radio equipment to the city for its police service, since the maintenance of a police service by the city is a governmental function, which extends to the purchase of equipment and supplies needed to make the service sufficient.

Citations:

Statute: United States Revenue act of 1932, ch. 25, sec. 607.

Case: Indian Motorcycle Co. v. United States, 51 S. Ct. 601 (1930-31).

FEDERAL EXCISE TAX ON GAS AND OIL OF CITY

(No. 8778—*City Comptroller—M. H. F.—May 25, 1935—4½ pp.*)

The city must pay the federal excise tax on gasoline and lubricating oil purchased for use in performing non-governmental functions, such as selling water for consumption as distinguished from supplying water to extinguish fires.

Citations:

- Cases: Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429 (1895).
South Carolina v. United States, 199 U. S. 437 (1905).
Ohio v. Helvering, 292 U. S. 360 (1934).
Collector v. Day, 78 U. S. 113 (1870).
Metcalf and Eddy v. Mitchell, 269 U. S. 514 (1926).
Flint v. Stone Tracy Co., 220 U. S. 107 (1911).
Wagner v. City of Rock Island, 146 Ill. 139 (1892-93).
City of Winona v. Botzet, 169 Fed. 321 (1909).

Opinion No. 8502 of September 14, 1934, to the City Comptroller discusses the same point as the above opinion.

FEDERAL EXCISE TAX ON OIL FOR WATER PURPOSES

(No. 8109—*Commissioner of Public Works—C. N.—July 10, 1933—2 pp.*)

Oil supplied to the Bureau of Engineering of the Department of Public Works which is paid from the water fund, is for corporate, as distinguished from a governmental purpose and is thus not exempt from the federal excise tax.

Citation:

- Case: Wagner v. City of Rock Island, 146 Ill. 154 (1892-93).

FEDERAL TAX ON ELECTRIC ENERGY

(No. 7741—*Commissioner of Public Works—L. H.—September 8, 1932—2 pp.*)

The federal tax on electric energy for domestic or commercial consumption applies to all such energy consumed for business purposes as distinguished from governmental, public, charitable, or educational purposes and therefore, the city, as vendor of such energy to its tenants on the Navy Pier should charge for and collect the tax from these tenants.

Citations:

- Statute: Federal Revenue Act (1932), sec. 616 (a).
Other reference: Opinion No. 7715 (this volume, p. 14)

FEDERAL TAX ON ELECTRIC ENERGY USED BY CITY

(No. 7715—*Commissioner of Gas and Electricity—R. N.—August 13, 1932—1½ pp.*)

The City of Chicago is exempt from the federal tax on electric energy consumed by it for the lighting of rooms occupied by the city's Department of Gas and Electricity in a privately owned building.

Citation:

Statute: Federal Revenue act (1932), sec. 616 (a, c).

FEDERAL TAX ON ELECTRIC ENERGY SOLD BY CITY

(No. 7706—*City Comptroller—L. H.—August 9, 1932—4 pp.*)

Although the city is exempt from the federal tax imposed on consumers of electric energy, when the city sells such energy to a person not exempt from the tax, it must collect this tax from such consumers. The city is liable for such tax only in case it has actually collected the tax or has not made due efforts to collect such tax.

Citations:

Statutes: Federal Revenue act (1932), sec. 616 (a, b, c), 772 (a).

FEDERAL TAX ON CITY'S SALARY CHECKS

(No. 7616—*City Comptroller—L. H.—June 20, 1932—2 pp.*)

Salary checks issued by the city to pay its employees do not come within the purview of the federal statute taxing checks, because those checks are not checks drawn upon "any bank, banker, or trust company."

FEDERAL TAXES ON CITY AND ITS WARRANTS

(No. 7613—*City Treasurer—L. H.—June 17, 1932—2½ pp.*)

The federal government cannot impose taxes on a state nor a political subdivision of a state, except on an activity the political subdivision carries on in its private, corporate capacity as distinguished from its governmental capacity.

Neither ordinary city warrants nor sub-warrants (pay checks) are within the purview of the federal act taxing checks, since they are not drawn on "any bank, banker, or trust company."

(3) *Other Federal Relationships*

CIVIL WORKS ADMINISTRATION PROJECTS—CITY'S LIABILITY FOR NEGLIGENCE

(No. 8284—*Chairman, Committee on Finance—E. L. M.—January 25, 1934—2½ pp.*)

The city is liable for the negligent performance of work by Civil Works Administration workers where the project is of the kind and nature that would bring it within the classification of a municipal corporate function of the city.

Citation:

Reference: 6 McQuillin, *Mun. Corp.*, sec. 2792.

Opinion No. 8380 of May 5, 1934, to the Chairman of the City Council Committee on Finance is in accord with the above opinion.

PUBLIC WORKS PROJECTS FINANCED BY UNITED STATES—FORM OF CONTRACT

(No. 8776—*Commissioner of Public Works—J. F. G.—May 24, 1935—3½ pp.*)

Local public works projects financed in part by grant from the United States must have the form of contract and completion bond in connection therewith in conformity with state laws and city ordinances where a part of the cost is financed by city funds.

Citations:

Ordinances: Code '31: 227, 230.

NOTES ON FEDERAL PUBLIC WORKS PROJECTS

Public Works: Municipalities are authorized to apply for and accept grants and loans from, and contract with, the United States government or any agency thereof for the purpose of financing any public project for governmental purposes.—Ill. Laws (1935), p. 507.

Public Works Relief: Municipalities are authorized to apply for grants and to make loans from and contracts with the Federal Emergency Administration of Public Works when the same is created by Congress.—Ill. Laws (1933), p. 221.

Public Contracts: A contract entered into by an Illinois city with the Federal Public Works Administration for the purpose of obtaining funds wherein conditions were imposed requiring contractors to comply with the National Industrial Recovery act and which imposed other conditions destructive of free competitive bidding is invalid, due to the public policy of Illinois concerning free and open bidding and the unconstitutionality of pertinent sections of the National Industrial Recovery act.—Illinois Power and Light Corp. v. City of Centralia, 11 F. Sup. 874.

NATIONAL INDUSTRIAL RECOVERY ACT—COMPLIANCE BY CITY

(No. 8180—President, Board of Health—B. J. K.—September 25, 1933—2½ pp.)

The city is not obliged to sign a certificate agreeing to comply with the National Industrial Recovery act, but a department of the city may do so of its own volition.

EASEMENT TO UNITED STATES BY CITY

(No. 8949 — Commissioner of Public Works — J. J. S.— November 29, 1935—2 pp.)

By statute, the city is authorized to grant the United States government an easement in certain city property for waterway purposes.

Citation:

Statute: SH '35, 24: 422a

TITLE OF UNITED STATES TO STREET ADJOINING PROPERTY

(No. 6665—Manager, Chicago Plan Commission—R. N. L.—May 10, 1930—3 pp.)

The acquisition by the United States of a block or tract of land does not give the United States title to that part of a street adjoining the property acquired.

Citations:

Statutes: Ill. Laws (1871-2), p. 551.

Cah '23, 143: 1, 2, 4.

Ill. Laws (1927), p. 872.

B. RELATIONS WITH STATE

State Control of City: The powers, duties, and liabilities of the city, unless restrained by constitutional limitations, are wholly under the control of the General Assembly and the legislature may compel the city to perform any duty which relates to the general welfare and security of the state, although the performance of the duty will create a debt to be paid by local taxation.—*People v. Chicago*, 351 Ill. 396 (1933).

REPORT TO THE SECRETARY OF STATE BY CITY

(No. 8934—Commissioner of Public Works—M. H. F.—November 19, 1935—1½ pp.)

The act requiring corporations that are not organized for pecuniary profit to make an annual report to the Secretary of State, relates to

private corporations and does not concern those of a public or municipal nature.

ORDINANCE CONTRAVENING A STATUTE—RETIRING OF FIREMEN

(No. 6552—*Fire Commissioner—J. L.—December 2, 1929—3½ pp.*)

A city ordinance is void if it conflicts with a state statute.

The city ordinance which permits the fire commissioner to peremptorily retire able-bodied firemen 62 years of age is void, since it conflicts with the state civil service law, which provides that the removal or discharge must be made through the Civil Service Commission.

Citations:

Ordinance: Code '22:1202, as amended.

Statute: SH '29, 24½: 51.

Case: *People v. Thompson*, 252 Ill. App. 168, 173 (1929).

Other references: *Smith, Modern Law of Municipal Corporations*, p. 468.
Horr and Benis, Mun. Ord., p. 75.
Op. Corp. Counsel (1924-25), p. 564.
Id. (1925-26), p. 568.

STATE CONTROL OF MUNICIPAL EMPLOYMENT— RETIREMENT OF FIREMEN

(No. 6826—*Fire Commissioner—G. F. M.—January 15, 1931—3 pp.*)

The legislature has the power to prescribe conditions of employment in the public service of cities, including the power to provide an automatic retirement age for the member of the city's Fire Department.

Citations:

Statutes: Ill. Laws (1895), p. 85, sec. 12.

Cases: *People v. Kipley*, 171 Ill. 44 (1897-98).

People v. Loeffler, 175 Ill. 585 (1898).

Kipley v. Luthardt, 178 Ill. 525 (1899).

Higgins v. Sweitzer, 291 Ill. 551 (1920).

Hughes v. Traeger, 264 Ill. 612 (1914).

Pecoy v. Chicago, 265 Ill. 78, 80 (1914).

CITY POLICE POWERS OVER STATE AGENCIES AND BUILDINGS

(No. 6809—*Commissioner of Buildings—C. J. A.—December 3, 1930—7 pp.*)

A state administrative agency that does not exercise police powers is subject to the police power vested in the city and is bound to com-

ply with all reasonable fire and safety regulations which apply to the buildings of the agency.

If the legislature orders a building constructed and specifies the details of construction, the act supersedes any powers of the city involving the construction of the building.

Citations:

Statutes: Cities and Villages act, art. V, sec. 66, 63.
SH '29, 23: 5.

Cases: Culver v. City of Streator, 130 Ill. 238 (1889-90).
Williams v. Chicago, 266 Ill. 267 (1915).
Chicago v. Mandel Bros., 264 Ill. 206 (1914).
Patterson v. Johnson, 214 Ill. 481 (1905).
County of Cook v. Chicago, 311 Ill. 234 (1924).

CONTROL OF NAVIGABLE WATERS—LICENSING DANCE HALL ON BOAT

(No. 6532—*Commissioner of Police—W. V. D.—October 23, 1929—3 pp.*)

The state has full power to legislate concerning the use of navigable waters which are within the territorial limits of the state, subject only to the authority of Congress over commerce and navigable waters.

The city has the power delegated by the state, to regulate or license a boat that is moored within the corporate limits of the city for dance hall purposes.

Citations:

Statutes: Cah '29, 24: 65 (33, 35), 111, 489.

Cases: Tollefson v. City of Ottawa, 238 Ill. 134 (1909).
Wilcox v. Chicago, 107 Ill. 334 (1883).
Chicago v. McGinn, 51 Ill. 266 (1868-69).
Canada Atlantic Transfer Co. v. Chicago, 210 Fed. 7, 9 (1913).

POWER OF HOUSING AUTHORITIES—EFFECT ON ZONING AND BUILDING ORDINANCES

(No. 8468—*Chairman, Committee on Building and Zoning—C. N.—July 13, 1934—2 pp.*)

The jurisdiction of the City Council and the efficacy of zoning ordinances or the building code as to construction requirements are not affected by anything in either the federal or state laws on housing and housing authorities.

The State Housing Authorities act gives the housing authorities the right to enter into agreements with the PWA for the supervision

and control of state projects, to take over projects initiated by the PWA and to acquire real and personal property from the PWA.

Citations:

Statutes: SH '33, 32: 504-544.

Ill. Laws (Sp. sess., 1933-34), p. 161, 164 (Housing Authorities act, sec. 8, 12).

MOTOR VEHICLE LICENSE FEE FOR STATE-OWNED AUTOS

(No. 6917—*Department of Trade and Commerce—L. H.—May 26, 1931—2½ pp.*)

The city has no authority to collect a vehicle license tax from the state on state-owned motor vehicles.

Citation:

Statute: Motor Vehicle act, sec. 26.

VEHICLE LICENSE FOR STATE-OWNED AUTOS USED IN CITY

(No. 8790—*City Clerk—M. H. F.—June 7, 1935—3 pp.*)

The City Clerk cannot issue automobile vehicle stickers without charge for automobiles operated by the state, but registered at Chicago addresses, without an amendment to the City Code.

State-owned automobiles operating on the city's streets should be marked conspicuously to show state ownership, so that the police can readily distinguish them from vehicles operated by tax evaders.

Citations:

Ordinances: Code '31: 2073-74.

STARS ON AUTOMOBILES OF STATE OFFICIALS

(No. 7167—*L. H.—October 5, 1931—2 pp.*)

The city ordinance which would prevent members of the General Assembly, other state officers, and officers having the power of conservators of the peace from displaying stars on their automobiles operated in the City of Chicago has been invalidated by the subsequent passage of a state statute on this subject.

Citation:

Statute: Ill. Laws (1931), p. 790.

Opinion No. 7127 to the Acting Commissioner of Police and Opinion No. 7128 to the City Council, both dated September 15, 1931, are in accord with the above opinion.

STATE CHAUFFEUR'S LICENSE FOR CITY EMPLOYEE

(No. 7931—*Commissioner of Public Works—Jud. G.—February 6, 1933—2 pp.*)

A chauffeur in the employ of the city driving a motor vehicle used solely in the municipal business need not secure a state chauffeur's license.

¹Citation:

Statute: SH '31, 121: 228 (Motor Vehicle act, sec. 27).

**POWER TO EXEMPT PROPERTY LEASED TO STATE
FROM TAXATION**

(No. 8157—*Mayor—W. L. S.—August 28, 1933—6 pp.*)

The authorities of the city have no power to exempt any property from taxation or to determine officially that any property is so exempt.

If the property adjacent to the Illinois Charitable Eye and Ear Infirmary were rented to the state for use as the recreation ground of patients of the infirmary and for the giving of sun treatments when cases required this care, this property would not be exempt from taxation.

Citations:

Constitution: Illinois, art. IX, sec. 3.

Statute: Revenue act, sec. 2, cl. 5, 7.

Cases: People v. University of Illinois, 328 Ill. 377 (1928).

People v. Ravenswood Hospital, 238 Ill. 137 (1909).

People v. Chicago, 323 Ill. 68 (1927).

STATE SALES TAX ON CITY'S WATER SALES

(No. 8002—*Commissioner of Public Works—L. H.—April 6, 1933—1½ pp.*)

The city in distributing water to the residents of the city is not subject to the retailers' occupational tax.

Opinion No. 8339 of March 22, 1934, to the Commissioner of Public Works discusses the same point as the above opinion.

Sales Tax on Water: The Retailers' Occupational Tax act was held not applicable to public utilities in the sale of their services to the public.—Peoples Gas Light & Coke Co. v. Ames, 359 Ill. 152 (1935).

In 1935 a 3% tax based on the gross receipts of public utilities was enacted under the title of the Public Utility Tax act. Such tax was made expressly applicable to utilities operated by cities and other political subdivisions.—Ill. Laws (1935), p. 1195.

The constitutionality of such act as applied to water sales by the city was questioned and the Circuit Court issued an injunction in behalf of the

city against the State Director of Finance to restrain him from enforcing this tax on city water bills. An appeal is pending in the Illinois Supreme Court.—*City of Chicago v. Ames*, Circuit Court of Cook County, No. 35-C-15904. Decree issued Nov. 29, 1935.

STATE LICENSE AND TAX OF CITY'S MOTOR FUEL

(No. 8739—*Commissioner of Public Works—M. H. F.—April 9, 1935—8 pp.*)

The city comes within the statutory definition of motor fuel distributor and must obtain a distributor's license, but this does not subject it to the Retailers' Occupational Tax act for the city does not resell the motor fuel. The city is not exempt from paying the State motor fuel tax of three cents per gallon on gasoline which it purchases.

Citations:

Statutes: Motor Fuel Tax act, secs. 1, 2, 3, 5, 6.
SH '33, 120: 440-453.

Cases: *People v. Deep Rock Oil Corp.*, 343 Ill. 388, 401 (1931).
Commonwealth v. Wiloil Corporation, 173 Atl. 404 (Pa. 1934).

Opinion No. 6509 of September 16, 1929, and No. 6609 of March 1, 1930, both to the Deputy City Comptroller, discuss the same point as the above opinion.

TAX ON GASOLINE USED BY CITY FIRE DEPARTMENT

(No. 7187—*Mayor—M. F. M.—October 14, 1931—3 pp.*)

The decision of the Supreme Court in the *Deep Rock* case holding that the gasoline tax is an excise tax does not foreclose the city from claiming reimbursement of the tax on gasoline used within six months next preceding the claim by the Fire Department in its engines while stationary and actually fighting fires.

Citations:

Statutes: Cah. '31, ch. 95a (Motor Fuel Tax act, 1929).

Cases: *People v. Deep Rock Oil Corp.*, 343 Ill. 388 (1931).

REFUNDS OF STATE MOTOR FUEL TAX TO CITY

(No. 8009—*City Comptroller—M. H. F.—April 10, 1933—3 pp.*)

Where the city is unable to pay the motor fuel tax within the six months allowed for refund claims and the state demands proof of payment in the form of receipts before allowing refunds, the only alternative of the city is to file its claims, whether payment has been made or not, within the six month period allowed and forward receipts as proof of claim as the bills are paid.

**ACT AND ORDINANCE ON SAME SUBJECT—CO-OPERATION
IN ILLINOIS EMERGENCY RELIEF**

(No. 8053—*Commissioner of Public Welfare—C. N.—May 13, 1933—3 pp.*)

Specific enactments of the legislature supersede city ordinances on the same subject.

The act creating the Illinois Emergency Relief Commission seems to imply that the commission and the city are to co-operate in operating relief stations and shelters for homeless men and women.

Citations:

Statute: Ill. Laws (3rd sp. sess. 1932), p. 191 (Illinois Emergency Relief Commission act).
Ordinance: Code '31: 504.

**LIABILITY FOR WORKERS FURNISHED CITY BY ILLINOIS
EMERGENCY RELIEF COMMISSION**

(No. 8429—*Commissioner of Police—L. H.—June 9, 1934—1½ pp.*)

Heads of city departments and other separate agencies cannot, without special Council authorization, sign an agreement with the Illinois Emergency Relief Commission to the effect that the city assumes liability under the Illinois Workmen's Compensation act for the workers furnished to city departments by the commission. An ordinance permitting this is under consideration.

Opinion No. 8430 of June 9, 1934, to the secretary of the Commission for Revising the Building Code is in accord with the above opinion.

Relief Administration: The heads of city departments and agencies who are authorized to employ workers assigned by the Illinois Emergency Relief Commission are empowered to bind the city by agreement with the commission that the workers so employed will be protected by the Workmen's Compensation act.—Coun. J. (1934-35), p. 2516.

**ILLINOIS EMERGENCY RELIEF COMMISSION—WORKMEN'S
COMPENSATION**

(No. 7767—*Illinois Emergency Relief Commission—J. F. G. and J. J. O.—October 11, 1932—4 pp.*)

Claims for liability arising out of service rendered by the Illinois Emergency Relief Commission and the Federal Emergency Relief Commission under circumstances set forth in the Workmen's Compensation act may be made against the state without subjecting the funds set apart for relief to the payment of those claims.

WRECKING PERMIT TO ILLINOIS EMERGENCY RELIEF COMMISSION—PROOF OF OWNER'S CONSENT

(No. 8544—*Deputy Acting for the Mayor, Department of Buildings—A. F. G.—October 26, 1934—2½ pp.*)

The Department of Buildings may refuse a wrecking permit to a contractor until the latter furnishes proof of the consent of the owner or that he is the agent for the owner for this purpose.

The Department of Buildings may issue free permits to wreck buildings to the Illinois Emergency Relief Commission.

Citation:

Ordinance: Code '31: 1197.

BONDING CITY EMPLOYEES HANDLING ILLINOIS EMERGENCY RELIEF FUNDS

(No. 8119—*Commissioner of Public Works—L. H.—July 14, 1933—2 pp.*)

The City Council may provide for the bonding of the superintendents of municipal lodging houses who handle Illinois Emergency Relief funds turned over to them for pay roll purposes, but such bond should be the bond of the individual employee to the Commissioner of Public Welfare and not the bond of the city itself.

C. RELATIONS WITH NEIGHBORING MUNICIPALITIES

(1) Annexation and Disconnection.

ANNEXATION OF ENTIRE VILLAGE—DISPOSITION OF PROPERTY AND DEBTS

(No. 7012—*City Comptroller—L. H.—July 14, 1931—2½ pp.*)

Where the city annexes an entire village under a statute providing for the annexation of incorporated territory, it is entitled to all the property of the village, including tax payments, and is liable for all the latter's debts.

Citation:

Statute: Annexation act of 1889, sec. 6.

TAXES OF ANNEXED VILLAGE

(No. 8132—City Comptroller—L. H.—July 27, 1933—4 pp.)

When the city annexes a village it may add the collections of the village tax for the annexation year to the city funds and use such proceeds to pay the village obligations.

When an entire municipality is annexed, the collection of taxes should be continued and the proceeds paid to the treasurer of the annexing city or town.

Citation:

Statute: SH '31, 24: 390, 391 (Annexation act, secs. 5, 6).

TAX COLLECTIONS OF ANNEXED VILLAGE

(No. 7000—City Comptroller—L. H.—July 10, 1931—2½ pp.)

The acceptance by the City Comptroller of tax collections, on account, for a village annexed to the city, will not jeopardize any future legal proceedings of the city on matters of finance, such as taxation, connected with the annexation of the village.

PROCEDURE IN ANNEXATION OF PART OF VILLAGE

(No. 6488—City Comptroller—L. H.—August 9, 1929—5 pp.)

To annex a portion of a village to the city, the village must first pass an ordinance agreeing to the disconnection and consenting to the annexation to the city. The city by ordinance must agree to the annexation and financial arrangements, conforming to the annexation statute, may then be made.

Citations:

Statutes: SH '25, 24: 370-372, 395.

ANNEXATION OF ADJACENT TERRITORY OR PORTION OF VILLAGE

(No. 6804—Commissioner of Public Works—L. H.—November 20, 1930—4½ pp.)

A city may annex only adjacent territory.

The city has no authority to annex a village consisting of two non-contiguous areas, only one of which is adjacent to the city.

Where an attempted annexation of a whole village by the city is invalid, it cannot result in the annexation of any portion of the village.

Citations:

Statute: Cah '27, 24:428 (Annexation act of 1889, sec. 2).

Case: Village of Morgan Park v. Chicago, 255 Ill. 190 (1912).

RESULTS OF ANNEXATION

(No. 7928—*L. H.*—*February 3, 1933*—3 pp.)

In case of annexation of the cities of Park Ridge and Des Plaines by the city:

- (1) The city's police force would have jurisdiction in those areas.
- (2) The fire protection service and schools would be controlled by the city.
- (3) The water supply would have to be provided for under the special assessment statute.
- (4) The gas, electricity and phone rates of the city would probably take effect in the areas, depending upon the approval of the Illinois Commerce Commission.
- (5) The city would take over school buildings as its property and has to assume any indebtedness on the same.
- (6) The park districts will remain under their present jurisdiction.

In the case of a general annexation the city takes over the property of the annexed territory and assumes its indebtedness.

When only a portion of a city is annexed, the statute provides for an appraisal of the property and the debts so as to make an equitable distribution.

ANNEXATION OF PART OF TOWNSHIP

(No. 7980—*M. F. M.*—*March 24, 1933*—4 pp.)

Where only a part of a township is annexed to the city, the township does not lose its identity but still exists for governmental purposes and all qualified voters living within the township should be permitted to vote for township officers.

Citations:

Statutes: SH '31, 38: 655.

Id. 37:420.

Id. 121:62.

Id. 139:117.

Case: *People v. Johnson*, 266 Ill. 357 (1915).

PRIVATE WATER SYSTEM IN ANNEXED SUBDIVISION

(No. 7293—*Commissioner of Public Works—C. J. A.—November 13, 1931—2 pp.*)

Where the city annexes a subdivision, it is not required to purchase an existing private water system that is laid out in the subdivision.

Citations:

Statute: SH '29, 24: 397.

Ordinance: Coun. J. (1927-28), p. 2225.

POLICEMEN AND FIREMEN OF ANNEXED COMMUNITIES

(No. 6841—*Acting Commissioner of Police—L. H.—February 27, 1931—2½ pp.*)

When one village, city or incorporated town is wholly annexed to another, the policemen or firemen in the employ of the former must be transferred to the Police and Fire Departments of the annexing city.

Citation:

Statute: SH '31, 24: 402.

**EXTENT OF JURISDICTION BY ANNEXATION OF
EDISON PARK**

(No. 7577—*Commissioner of Public Works—L. H.—May 14, 1932—5½ pp.*)

The city could not acquire jurisdiction by annexation of Edison Park over territory that was not a part of Edison Park, and the boundary lines of the Forty-first Ward are incorrect in so far as they include within the ward the corner of a diagonal block projecting into the City of Park Ridge. An amendatory ordinance should correct this mistake.

Citations:

Ordinance: Coun. J. (1931-32), p. 652.

Other reference: Op. Corp. Counsel (1915-19), p. 225.

**TAX WARRANTS AND TAX ASSESSMENTS OF ANNEXED
VILLAGE**

(No. 8101—*City Comptroller—L. H.—June 24, 1933—3 pp.*)

Tax warrants issued by the Village of Beverly against the village tax levy of 1930 are void if there was no levy for that village in the year 1930.

As the city has annexed the Village of Beverly, it should take steps

to have the taxes for the year 1930 assessed and collected in order to forestall any judgments obtained by the holders of the void tax warrants against the city.

DISCONNECTION OF TERRITORY FROM CITY

(No. 6880—*Superintendent of Maps*—C. J. A.—April 28, 1931—4 pp.)

Disconnection of territory must comply with the state statutes and only the territory that is not laid out into city or village lots or blocks can be disconnected where the purpose is to leave the territory outside the limits of any incorporated municipality.

Where the city owns all the property in a territory that is to be disconnected, the requirement of a petition from the property holders therein, requesting disconnection, need not be complied with.

Citations:

Statutes: SH '29, 24: 372, 382.

DISCONNECTION OF TERRITORY LAID OUT IN LOTS OR BLOCKS

(No. 6732—*Alderman, 41st Ward*—C. J. A.—July 28, 1930—4½ pp.)

City territory which has been laid out into city lots or blocks cannot be disconnected until the plat of such territory has been vacated.

(2) Other Relationships

SUPPLYING WATER TO NEIGHBORING MUNICIPALITIES*

(No. 8044—*Mayor*—M. H. F.—May 5, 1933—5 pp.)

While the Sanitary District act seems to require the city to furnish water to a contiguous municipality that is located within the Sanitary District and which does not have a waterworks system, the city is not required to supply water to any such contiguous municipality, except at Chicago's boundary line and at the rate established by the Sanitary District act.

The City of Chicago is not obligated to furnish a contiguous municipality with water in quantities greater than may be required to supply consumers within the territory of the municipality.

The Commissioner of Public Works has no authority, without the permission of the City Council, to exempt or credit any portion of

*See also Opinion No. 8510, p. 799.

the Harvey water debt which might represent the charge for water supplied the Oak Forest Home.

Citations:

Statute: Sanitary District act, sec. 26.

Ordinance: Code '31: 4131.

Case: Chicago v. Town of Cicero, 210 Ill. 290 (1904).

OPINION OF FOREGOING SYNOPSIS

It seems that Harvey has been reselling some of the water purchased from Chicago to adjoining or nearby villages. * * *

It is claimed that the sum due from the Village of Markham is for Oak Forest Home, a Cook County institution, and that the County of Cook owes the Village of Markham over \$100,000. Apparently the effort is to effect a settlement whereby the City of Chicago would furnish water without charge to the Oak Forest Home and cancel that portion of its claim against Harvey which is represented by the Harvey claim against Markham. * * *

While the Sanitary District act, which was passed upon by the Supreme Court in the case of City of Chicago v. Town of Cicero, 210 Ill. 290, seems to require the City of Chicago to furnish water to a contiguous municipality, located within the district, which municipality does not have a water-works system, we believe it is clear that the City of Chicago is not required to supply water to any such municipality except at Chicago's boundary line and unless such adjoining municipality pays for the water at the rate established by the Sanitary District act. This rate is fixed by that act to be "at no greater price or charge than it (the City of Chicago) charges and collects of customers within its limits for water furnished through meters in like large quantities." The reading of the Sanitary District act also convinces us that the City of Chicago is not obligated to furnish a bordering municipality water in quantities greater than may be required to supply consumers within the territory of the bordering municipality. (See section 26, Sanitary District act.)

* * * Without Council authority the Commissioner of Public Works would have no authority to exempt or credit any portion of the Harvey debt which might represent the charge for water supplied the Oak Forest Home. If the Oak Forest Home were a City of Chicago institution, charges for water used by it might, in our opinion, be exempted and canceled pursuant to the provisions of section 4131 of the revised Chicago Code of 1931. * * * This ordinance provides that the supply of rate-exempt water is to be metered and further states that nothing contained therein shall be held to exempt property of the United States, of the State of Illinois or any of its political subdivisions, except as therein mentioned. To comply with this ordinance, Council authority would therefore be necessary to accomplish the cancellation of that portion of Harvey's debt represented by the water furnished the Oak Forest Home: * * *

SHUTTING OFF WATER SUPPLIED OTHER MUNICIPALITIES

(No. 8411—Commissioner of Public Works—M. H. F.—May 28, 1934—
2½ pp.)

The city has the power to shut off water supplied to outlying municipalities when their water bills have not been paid.

DISCONNECTION OF WATER SUPPLY BEYOND CITY LIMITS

(No. 7729—*Commissioner of Public Works—M. H. F.—August 23, 1932*
—6½ pp.)

The part of the public street at 138th street and South Halsted street was not occupied by any private persons and therefore it was validly disconnected from the City of Chicago by the passage of an ordinance on November 24, 1930, and hence that portion of the street has reverted to the jurisdiction of the State of Illinois.

The obligation of the city to furnish water to contiguous municipalities at the boundary line between them does not extend to private corporations; to supply water to private corporations at the boundary line would require negotiation and contract and an ordinance by the Chicago City Council authorizing the tapping of the water main at the boundary line.

The City of Chicago has no authority to build a water tunnel beyond its boundaries for the purpose of distributing water to adjoining municipalities or users, and such users must come to the boundary line with their own instrumentalities for getting the water.

Public corporations buying water from the City of Chicago probably could not resell such water at a profit.

Owners of premises into which water is supplied through the Chicago waterworks system may not in turn supply such water to other premises without securing a permit from the Commissioner of Public Works.

Citations:

- Statutes: SH '29, 24: 382.
SH '31, 24: 378a, 429.
Id. 42: 348 (Sanitary District act, sec. 26).
Ordinances: Code '31: 4086.
Coun. J., (1930-31), p. 3989.
Case: Chicago v. Town of Cicero, 210 Ill. 290 (1904).

TIME EXTENSION TO PAY WATER BILL OWED BY VILLAGE

(No. 7749—*Superintendent of Water—M. F. M.—September 20, 1932*—
1½ pp.)

An agreement between the Sanitary District of Chicago and the Village of Stickney does not bind the city to extend the time for the payment of water bills owed by Stickney to the city.

INTERFERENCE IN PLANS OF CITY OF HARVEY FOR WATER SUPPLY

(No. 8607—*Commissioner of Public Works—J. F. G.—December 31, 1934—2½ pp.*)

The city cannot by any legal procedure interfere with the plans of the City of Harvey and the Harvey Water Company outlined in the lease of the water supply and distribution system of the City of Harvey to the Harvey Water Company.

POLICE COORDINATION—TELEPHONIC CONNECTIONS

(No. 8251—*Commissioner, Department of Gas and Electricity—C. N.—December 22, 1933—3 pp.*)

The Police Departments of Chicago and Evanston may provide for direct telephonic communication between them without any special authorization by ordinance.

The police in any part of Cook County may coordinate their work of crime prevention as peace officers without regard to local borderlines.

Citations:

Statutes: Cah '33, 24: 491, 492.

POLICEMEN ASSIGNED TO EVANSTON

(No. 6652—*Commissioner of Police—F. J. V.—April 25, 1930—2 pp.*)

A police lieutenant of the city assigned to service in Evanston may be kept on the payroll of the city when Evanston has agreed to reimburse the fund from which the lieutenant's salary will be paid. Such a procedure is not illegal but only irregular.

The assignment of a police lieutenant to service as Chief of Police of Evanston is not such an exercise of administrative discretion as to invalidate the lieutenant's status in the Police Department of the city and his right to a pension.

Opinion No. 7595 of June 3, 1932, to the City Comptroller is in accord with the above opinion.

POLICE STAR ON AUTO OF POLICE OFFICIAL OF OTHER CITY

(No. 6967—*Alderman, 7th Ward—F. J. B.—June 22, 1931—2½ pp.*)

The city ordinances forbid the display of a police star on the auto-

mobile of a police official from another city, when the car is being operated in Chicago.

Citations:

Statutes: SH '29, 24: 421, 422;

Id 121: 250a.

Cases: Kindred v. Still, 51 Ill. 401 (1868-69).

Stars on Autos of Police of Other City: A statute of 1931 authorizes elected state officers and officials having the power of conservators of the peace to display police stars on their cars. Thus this city ordinance is inoperative as to such officials.—Ill. Laws (1931), p. 790.

WATER PIPES OF TOWN OF CICERO IN CITY STREETS

(No. 8434—*Commissioner of Public Works—E. L. M.—June 14, 1934—3 pp.*)

Since the city is bound to use care to keep its streets reasonably safe the city would be primarily liable for any injury resulting from leakage or other repair work on a water main belonging to the Town of Cicero under Chicago streets where negligence could be shown; however, the city could probably recover from the Town of Cicero for any damages or expense arising from the presence of this main.

The city probably could not enforce any claim for compensation against the Town of Cicero for the use of its streets because of the long occupancy of city property, especially the long period of non-use, without any claim or objection having been asserted.

The owners of pipes in city streets have no rights in them except of a permissive nature, but the city cannot seize them or forcibly remove them unless the owners themselves fail to remove them after due notice has been given them by the Commissioner of Public Works.

Citation:

Reference: 17 Op. Corp. Counsel 186.

CONTROL OF CITY FINANCES—PAYMENT OF VILLAGE DEBT TO CITY

(No. 7774—*Commissioner of Public Works—L. H.—October 11, 1932—2 pp.*)

The control of the finances of the city is in the City Council.

The City Council may grant time to a village to pay a debt and may take as security a tax warrant which the village is bound to pay when its taxes are collected.

The city authorities have no power to give away city property without charge.

SPECIAL ASSESSMENTS AGAINST CITY PROPERTY IN A VILLAGE

(No. 7475—City Comptroller—L. H.—March 2, 1932—4½ pp.)

The city is obligated to pay, as the installments come due, the special assessments levied by the Village of Brookfield against the city's Brookfield property. Even if this property were used so as to be exempt from general taxes, the city would still be liable for a special assessment for grading and paving a street on which the property abuts and which will enhance the property's value.

The installments due on the special assessments of the city's Brookfield property cannot be paid by the comptroller unless appropriations therefor are made from year to year.

Ordinances of the City Council direct that the comptroller include the amounts necessary for the installment payment of the special assessments in question in his estimates from year to year.

There can be no judgment against the city which amounts to a general obligation against the city for failure to pay the special assessment on its Brookfield property.

Citations:

Ordinances: Coun. J. (1922-23), p. 1243.
Id. (1923-24), p. 225.

Cases: County of McLean v. City of Bloomington, 106 Ill. 209 (1883).
West Park Commissioners v. Chicago, 152 Ill. 392 (1894).

D. RELATIONS WITH OTHER LOCAL GOVERNMENTS

(1) Cook County

PAYMENT OF MUNICIPAL COURT FEES BY COUNTY

(No. 8606—Chairman, Committee on Finance—M. H. F.—December 29, 1934—3 pp.)

The City of Chicago may demand the payment of certain Municipal Court fees due by statute from the county even though a year has elapsed since the date on which the city had the right to demand such payment.

Citations:

Statute: SH '33, 37: 417.

Case: Logan County v. City of Lincoln, 81 Ill. 156 (1875-76).

Municipal Court Jury Costs: A writ of mandamus was granted on petition of the People on the relation of the city to compel the county to pay jurors of the Municipal Court their statutory fees.—People v. Board of County Commissioners, 355 Ill. 244 (1934).

DEFAULT IN PAYMENT ON UTILITY SUPPLIED TO COUNTY BY CITY

(No. 8906—*Commissioner of Public Works—M. H. F.—October 29, 1935—3 pp.*)

The Department of Public Works may legally continue to deliver steam and electricity to the county, even after default in payment, so long as that delivery of steam and electricity does not amount to a donation.

The failure of the county to pay for steam and electricity delivered to it by the city should be presented to the City Council and if prompt adjustment is not obtained, the city may protect itself by discontinuing further services.

Citations:

Case: *Eastern Illinois State Normal School v. Charleston*, 271 Ill. 602 (1915-16).

Other reference: 1 McQuillin, *Mun. Corp.* (2nd ed.), sec. 380.

JURISDICTION OF COUNTY CORONER OVER DEAD BODIES

(No. 7371—*Commissioner of Police—E. L. M.—December 11, 1931—3 pp.*)

The County Coroner has the duty of taking full charge and control of the dead body of any person found in the county if the person died by violence, from an unknown cause, or without medical attention. No such responsibility is imposed on the police.

Citations:

Statutes: Cah '31, 31: 10, 11, 12.

Ordinance: Code '31: 2192.

APPOINTMENT AND DUTIES OF SPECIAL DEPUTY SHERIFF

(No. 7034—*Acting Commissioner of Police—C. J. A.—July 29, 1931—3½ pp.*)

The sheriff is not authorized to appoint a special deputy sheriff except for a limited temporary purpose designated in writing, or in case of a sudden, grave emergency which is likewise temporary.

A special deputy sheriff would be authorized to go armed only while performing his official duties and these duties must be limited to some specific purpose as designated in the order appointing him.

Citations:

Statutes: SH '29, 38: 155.

Cah '29, 125: 7, 10.

Cases: *Guyman v. Burlingame*, 36 Ill. 201 (1864-65).

Christian County v. Merrigan, 32 Ill. App. 428 (1889-90).

People v. Cermak, 239 Ill. App. 195 (1925-26).

Other references: *Op. Corp. Counsel* (1915-16), p. 159.

Id. (1920-23), p. 1030.

CONTRACT BETWEEN CITY AND COUNTY FOR HOUSING PRISONERS

(No. 7269—*President, Board of County Commissioners—L. H.—November 7, 1931—1½ pp.*)

When a contract is entered into between the city and county for the housing of prisoners and the maintenance of a home for dependent and delinquent children, the Board of County Commissioners is required to give public notice in some newspaper that is printed and published within the county for a period of not less than four weeks and this notice is to state the period of time for which the agreement will remain in force.

Citations:

Statute: SH '29, 67: 8.

Ordinance: Coun. J. (1931-32), p. 1041.

Opinion No. 7289 of November 12, 1931 to the Board of Commissioners of Cook County is in accord with the above opinion.

CONVEYANCE TO CITY OF COUNTY'S INTEREST IN PROPERTY

(No. 8669—*Comptroller—J. F. G.—February 9, 1935—3½ pp.*)

The Board of Commissioners of Cook County has the authority to pass a resolution directing its officers to quitclaim all right, title and interest of the county in all the real estate (including the land and buildings) which was formerly used for the purposes of the Juvenile Court and the Detention Home. It is not necessary to go through the process of having the property appraised, offering it for sale and dividing the proceeds between the county and city, since the title to the land has always remained with the city and the building and equipment have depreciated to nothing.

LEGALITY OF COOK COUNTY CONSTABULARY

(No. 7819—*Commissioner of Police—E. R. D.—November 26, 1932—3 pp.*)

The sale of tickets by the Cook County Constabulary and the issuance of so-called courtesy cards is a racket organized to entice credulous persons to make donations by causing them to believe that a benefit will accrue to the police or themselves, and is a violation of the law pertaining to the obtaining of money by use of a confidence game.

There is no legal body known as the Cook County Constabulary.

Citations:

Cases: *People v. Piers*, 307 Ill. 539 (1923).

People v. Strosnider, 264 Ill. 434 (1914).

(2) *Park District*

RELATIVE POWERS OF CITY AND PARK DISTRICT—LICENSING STATIONARY ENGINEERS

(No. 8735—*President, Board of Examiners of Stationary Engineers—W. L. S.—March 30, 1935—15 pp.*)

Powers delegated to the Chicago Park District are not subject to like powers exercised by the city, but the city's police ordinances, which do not interfere with the exercise of the park district's powers, may be enforced by the city in territory under the control of the Chicago Park District within the city limits.

Stationary engineers employed within the city limits by the Chicago Park District or in territory under the control of the Chicago Park District within the city limits are subject to the ordinances of the city regulating the examination and licensing of stationary engineers.

Citations:

Ordinances: Code '31: 3754-3764 (Stationary Engineers).

Cases: *Ballard v. Chicago*, 69 Ill. App. 638 (1896-97).

West Chicago Park Commissioners v. Chicago, 152 Ill. 392 (1894).

County of Cook v. Chicago, 311 Ill. 234 (1924).

Pasadena School District v. City of Pasadena, 166 Cal. 7 (1913).

Bowers v. Wright, 4 WNC (Pa.) 460 (1877).

Other references: Opinion No. 6819 (this volume, p. 39)
37 CJ 178.

OPINION OF FOREGOING SYNOPSIS

You wish to be advised as to the authority of the Board of Examiners of Stationary Engineers to enforce the provisions of the city's ordinances as to licensing of stationary engineers in territory under the control of the new Chicago Park District. In other words, are stationary engineers employed by the new Chicago Park District or upon its territory amenable to the provisions of such ordinances?

The Chicago Park District was created by an act of the legislature approved by the Governor on July 10, 1933. It was later adopted by the voters upon a referendum vote. Said act states that, "The Chicago Park District shall be created and established immediately upon the adoption of this act as hereinafter provided. Such park district shall be in succession to all park districts now existing within the territory included within the proposed Chicago Park District and shall exercise control over and supervise the operation of all parks, boulevards, ways and other public property now under the jurisdiction of any of said park districts. The Chicago Park District shall comprise all of the City of Chicago and such territory located without the corporate limits of the City of Chicago as may be included in any existing park district lying partly within and partly without the limits of such city."

A small portion of the territory under the jurisdiction of the new Chicago Park District is outside of the corporate limits of the City of Chicago, though almost all of it is within such corporate limits.

The new Chicago Park District is a municipal corporation and the statute

with reference to its authority and powers reads so far as pertinent to the question presented as follows:

" * * * the Chicago Park District shall constitute a body politic and corporate * * *.

"The Chicago Park District shall be vested with all powers heretofore vested in park districts or corporate authorities whose authority is abrogated by this act or by the operation thereof. * * *

"The Chicago Park District shall have power to acquire, lay out, establish, construct, and maintain parks, driveways, and boulevards in such districts, and to control, manage, and govern such parks, driveways, and boulevards, and the use thereof. * * * The commissioners of such district shall constitute the corporate authorities thereof, and shall have full power to manage and control all the officers and property of the district, and all parks, driveways, boulevards, and parkways maintained by such district or committed to its care and custody.

"The commissioners of the Chicago Park District may from time to time establish by ordinance all needful rules and regulations for the government and protection of parks, boulevards, and driveways and other property under its jurisdiction; may exclude all objectionable travel and traffic and may make and enforce reasonable traffic and other regulations; and provide penalties not exceeding two hundred dollars for any offense for the violation of such rules and regulations."

It will be noted that the statute vests the new Chicago Park District with all the powers vested in park districts or corporate authorities whose authority was abrogated by the new Chicago Park District act.

The powers vested in the several park authorities, whose authority was abrogated by the new Chicago Park District act, were contained in various acts of the General Assembly. The powers granted by the different acts though were substantially similar and in so far as relates to the question now under discussion the former park boards had full and exclusive power to govern, manage and direct the parks under their control; to lay out and regulate the same; to pass ordinances for the regulation and government thereof; to appoint such engineers, surveyors, clerks and other officers, including a police force, as might be necessary; to define and prescribe their respective duties and authority; to fix the amount of their compensation; and generally in regard to said parks, they possessed all the power and authority by law conferred upon or possessed by the City Council of the City of Chicago in respect to the public squares and places in the city.

The ordinances, the enforcement of which is committed to your board, are contained in sections 3757 to 3764 of the Revised Chicago Code of 1931, and provide for the examination as to fitness and the licensing of stationary engineers.

The said ordinances were passed by the City Council in pursuance of powers explicitly granted by the state to the city by an act passed in 1889 entitled, "An act to insure the better protection of life and property from steam boiler explosions." * * *

* * * * *

The Illinois Appellate Court in holding the above act valid (Ballard v. City of Chicago, 69 Ill. App. 638) said:

"The object on the part of both the state and the city is the commendable one of affording protection to life and property.

* * * * *

"The system and the intention of the law is in the direction of safety to life and property, and the ordinance and regulations being lawful, reasonable and uniform, should be upheld."

The jurisdiction of the new Chicago Park District within the territory that it controls for the purpose for which it was created is exclusive of the

powers of the city. The Chicago Park District necessarily has certain police powers, and the question arises whether the City of Chicago has authority to subject stationary engineers employed by or upon the territory controlled by the new Chicago Park District within the city to its regulating ordinances licensing such engineers in the exercise of its police power.

Neither the new Chicago Park District nor the former park commissioners and park authorities whose authority was abrogated by the new Chicago Park District act were specifically granted police powers with respect to protection of life and property from steam boiler explosions, by the licensing of stationary engineers.

The only problem before us for solution is one of power. If the city has jurisdiction over the matter, the park district has not, and vice versa.

* * * * *

In *West Chicago Park Commissioners v. Chicago*, 152 Ill. 392, the Supreme Court said:

"We do not intend to intimate that in the exercise of other municipal powers and functions, the city is excluded from jurisdiction over park property, but only so far as related to the laying out, improvement, management and control of the parks, the jurisdiction of the park board is exclusive."

County of Cook v. City of Chicago, 311 Ill. 234, was a case which involved the question whether the police power ordinances of the City of Chicago were enforceable against the County of Cook in the matter of the construction of a public building which the statutes required the county to erect. In that case our Supreme Court said:

"We are of the opinion that the police power delegated to the city must be construed, as between the county and the city, as a delegation of power to the latter which the former is expected to observe * * *. We are of the opinion that in enacting paragraph 63 of article 5 of the Cities and Villages act, and in using the language, 'and to cause all such buildings and enclosures as may be in a dangerous state to be put in a safe condition,' the legislature intended to confer upon the City Council such power over all of the buildings erected within the city as the words there indicate including those of the county or other municipalities located therein."

The new Chicago Park District, it is true, has among other things, power to control and manage the parks, to make by ordinance all needful rules and regulations for the government and protection of the parks under its jurisdiction; to have full and exclusive power to govern and manage the parks; to appoint such engineers, clerks and other officers as may be necessary and to define and prescribe their respective duties and authority; and to possess all the power and authority conferred by law upon the City Council in respect to the public squares and places in the city.

Are the powers granted to the new Chicago Park District, however, broad enough to exclude the city from enforcing in the territory of the park district within the city its police power ordinances regulating the licensing of stationary engineers?

The power of the new Chicago Park District to determine for itself the qualifications of stationary engineers to the exclusion of the right of the city to impose proper and necessary police regulations governing the examination and licensing of stationary engineers cannot be implied, we think, from the grant of power to manage the parks or to make rules as to the duty and authority of its employees, or from any other language in the grant of power to the new Chicago Park District.

* * * * *

It is well known that some of the parks under the control of the Chicago Park District are immediately adjacent to what are probably the most densely populated parts of the City of Chicago.

An unqualified stationary engineer employed by the park district in a

building in such territory might be a menace of incalculable extent to the lives and property of persons residing in the City of Chicago in the immediate vicinity of such parks.

"The power of a municipal corporation to license an occupation or privilege or to impose a license tax thereon is not an inherent power, but can be exercised only where it is plainly conferred by the state, either in express terms or by necessary implication; it will not be inferred from terms of uncertain import." 37 Corpus Juris, p. 178.

Powers of municipal corporations are always strictly construed. The city has been specifically given the power to examine and license stationary engineers within the city. The new Chicago Park District has not been given any such express authority and nothing may be included within its powers by doubtful inference. No one, we take it, would claim that the Chicago Park District has power to license stationary engineers or persons practicing any other vocation, trade, profession or calling.

While it is true that the Chicago Park District has exclusive jurisdiction for park purposes within the territory it controls and may prescribe the duties of its employees yet we see nothing in such powers in conflict with the power of the city to require engineers employed in the park to be licensed by the city. * * *

* * * * *

We do not think the legislature could have intended that only stationary engineers within the city outside of the territory under the control of the new Chicago Park District should be licensed, or that stationary engineers within the territorial limits of the city in territory within the control of the new Chicago Park District should not be licensed. And as the legislature has given no power to the park district to license such stationary engineers in territory controlled by the new park district, the legislature must have intended that the city should license them.

It is our view that the city has control of the licensing of stationary engineers within the limits of the city and that it has exclusive jurisdiction in this regard and its authority is paramount to that of the new Chicago Park District. * * *

Creation of Chicago Park District: The Chicago Park District may be created, if approved by referendum, to succeed to all park districts now existing in the territory within the city and such territory located without the corporate limits as may be included in any park district lying partly within and partly without the limits of the city.—Approved by referendum, April 10, 1934.—Ill. laws (1933), p. 725.

The territory located without the corporate limits of the city which had been included in the Chicago district was disconnected.—Ill. Laws (1935), p. 1021.

The constitutionality of the Chicago Park District act and the regularity of the election by which it was adopted were upheld. The creation of the Chicago Park District and the consequent dissolution of the superseded districts have been held to be a valid exercise of legislative power.—*People v. Kelly*, 357 Ill. 408 (1934).

Chicago Park District Debt: The Chicago Park District is authorized to assume the debts of the superseded park districts and to issue bonds to fund and refund the same and to levy and collect taxes for the payment of such bonds.—Ill. Laws (1935), p. 1012.

The act authorizing the Chicago Park District to assume the debts of the superseded park districts and to fund or refund such debts by bonds has been held valid.—*Kocsis v. Chicago Park District*, 362 Ill. 24 (1935).

ENFORCING CITY REGULATIONS IN PARK DISTRICT

(No. 6819—*World's Fair Committee Atty.*—L. H. and R. N. L.—December 23, 1930—6½ pp.)

All police ordinances of the city which do not interfere with the powers conferred on park commissioners may be enforced by the city in the parks within its corporate limits, especially when the health of the public is concerned.

Citations:

- Cases: McCormick v. South Park Commissioners, 150 Ill. 516 (1894).
Chicago Packing Co. v. Chicago, 88 Ill. 221 (1878).
County of Cook v. Chicago, 311 Ill. 234 (1924).

CONCESSIONS IN PARKS

(No. 8050—*Superintendent, Bureau of License*—M. H. F.—May 11, 1933—2 pp.)

The various park boards have full and exclusive power to regulate and license concessions located within their territory and the Chicago License Bureau should not attempt to force those concessions to comply with the city's license ordinances.

Citations:

- Cases: McCormick v. South Park Commissioners, 150 Ill. 516 (1894).
Illinois Malleable Iron Co. v. Lincoln Park Commissioners, 263 Ill. 446 (1914).
West Chicago Park Commissioners v. Chicago, 152 Ill. 392 (1894).
People v. Chicago Motor Bus Co., 295 Ill. 486 (1920).
Other references: Op. Corp. Counsel (1907-08), p. 163.
Id. (1897-1905), p. 40.
17 Id. 52.

**CITY'S JURISDICTION IN PARK DISTRICTS—INSPECTING
WEIGHING SCALES**

(No. 8836—*City Sealer*—L. V. R.—August 8, 1935—7½ pp.)

The mere fact that the Chicago Park District is a separate municipal corporation does not exclude the park areas under its control from the jurisdiction of the city in the exercise of any police power expressly delegated to the city and not delegated to the park district.

The city has the right to inspect weighing machines used by the public in the parks.

Citations:

- Statutes: Cities and Villages act, art. V, sec. 55, 56.
Cah '33, 147: 12.
Ordinance: Code '31: 2929.
Cases: McCormick v. South Park Commissioners, 150 Ill. 516 (1894).
West Chicago Park Commissioners v. Chicago, 152 Ill. 392 (1894).
Other reference: Opinion No. 6819 (this volume, p. 39)

LIQUOR LICENSE IN PARK DISTRICTS

(No. 8470—City Comptroller—M. H. F.—July 16, 1934—2½ pp.)

Businesses which are located on property which is under the jurisdiction of a park district and devoted to park purposes are not subject to the city's licensing ordinances. However, since local liquor licenses must be obtained in accordance with the State Liquor Control act and the park district is not empowered to issue any liquor licenses, a liquor dealer occupying park premises must obtain a liquor license from the Local Liquor Control Commissioner for the city. Property located within the city which is owned by the park district but not devoted to park purposes, is subject to the city's licensing ordinances.

Citations:

Statutes: SH '33, 105: 1-479.

Other reference: Opinion No. 8050 (this volume, p. 39)

PARK COMMISSIONERS' REGULATION OF CENTURY OF PROGRESS

(No. 8034—Secretary, Committee on License—W. L. S.—April 27, 1933—3 pp.)

Full and exclusive jurisdiction regarding the licensing, regulation and prohibition of various kinds of businesses conducted on the grounds of the Century of Progress Exposition lies with the South Park Commissioners so long as the Exposition continues and is open to the public.

Citation:

Ordinance: Coun. J. (1932-33), p. 3322.

BUILDING REGULATIONS FOR WORLD'S FAIR

(No. 7756—City Council—W. L. S.—September 23, 1932—7 pp.)

The intent of the legislature appears to be that the South Park Board of Commissioners should have full and complete responsibility for the safe construction of the World's Fair buildings.

If the City Council enacts a modified building code to apply to park areas where temporary expositions are held, in view of the uncertainty of the law, it is probably inevitable that conflicts will arise between the enforcing authorities of the city and the South Park Board.

Citations:

Statutes: Ill. Laws (1929), p. 559.

Id., (1930), p. 403.

Opinion No. 7512 of March 28, 1932 to the deputy acting for the Mayor, Department of Buildings, discusses the same point as the above opinion.

JURISDICTION OVER BOULEVARDS—NEWS STAND PERMITS

(No. 7396—Alderman, 5th Ward—Jud. G.—December 22, 1931—4 pp.)

Boulevard intersections in the territory of the South Park Commission are under the jurisdiction of the commission for boulevard purposes, and the city has no authority to allow news-stands to be placed there. The South Park Municipal Code forbids the erection of such stands.

Under the City Code news-stands may be placed on any public street adjacent to the boulevard lot line extended to the curb line of the street when a permit has been obtained from the Commissioner of Public Works.

Citations:

Ordinances: Code '31: 990.

South Park Code, sec. 56.

Cases: South Park Commissioners v. Chicago City Railway, 286 Ill. 508 (1919).

West Chicago Park Commissioners v. Chicago, 152 Ill. 392 (1894).

Chicago City Railway v. South Park Commissioners, 257 Ill. 602 (1912-13).

JURISDICTION OF PARK AND CITY POLICE OFFICERS

(No. 7102—Acting Commissioner of Police—E. R. D.—August 31, 1931—4½ pp.)

Park police officers have the right to patrol that portion of the park district for which they are appointed, and may, while on duty, bear arms to be used in the enforcement of the law and ordinances of the park district and of the City of Chicago.

While on duty, park police officers may pursue into the city's corporate limits and city police officers may pursue into a park district any lawbreakers and may there arrest such offenders.

Citations:

Statutes: Cah. '31, 24: 191.

Id., 105: 21, 286, 289, 305, 376.

PARK POLICE OFFICER'S JURISDICTION

(No. 6456—Commissioner of Police—J. W. B.—June 20, 1929—1½ pp.)

The activities of a police officer appointed by the West Pullman Park District must be confined exclusively to the park district. His jurisdiction does not extend to the city streets which bound the district.

USE OF CITY FIREHOUSE BY PARK DISTRICT—PARK DISTRICT EXPENSES

(No. 6702—Attorney for Old Portage Park District—C. J. A.—July 2, 1930—8 pp.)

The city may charge for the use of its fire engine house by a park district as a polling place.

The residents of the park district, even though they are all residents of the city, have no legal right to demand that their expenses as a district be borne by the people of the city at large.

Citations:

Cases: Worden v. New Bedford, 131 Mass. 23 (1881).

French v. Quincy, 85 Mass. 9, 13 (1861).

City of St. Louis v. The Maggie P., 25 Fed. 202 (1885, 1886).

Other references: 44 CJ 1092.

Dillon, Mun. Corp. (5th ed.), sec. 997.

TRANSFER OF CITY PARKS TO CHICAGO PARK DISTRICT

(No. 8320—Mayor—J. F. G.—March 6, 1934—3 pp.)

The control of municipal parks may be transferred to the Chicago Park District by the City Council with the consent in writing of the owners of a majority of the frontage of the lots and lands abutting on each park.

Citations:

Constitution: Illinois, art. IV, sec. 34.

Statutes: SH '33, 24: 512.

Id., 30: 156.

Id., 105: 48.

Cities and Villages act, art. XII, sec. 6.

Ill. Laws (1933), p. 727.

DURATION OF CONCESSION IN PARK DISTRICT

(No. 7837—Mayor—L. H.—December 14, 1932—4 pp.)

A contract granting a concession for eight years, made by the Lincoln Park Board of Commissioners, being one that would bind the successors of the present board, is probably an unreasonable one, unless it imposes an obligation involving a large initial expense.

Citations:

Case: People v. Chicago Motor Bus Co., 295 Ill. 486 (1920).

Other references: 3 McQuillin, Mun. Corp., sec. 1356.

44 CJ 72.

SURRENDER OF CITY STREETS TO PARK DISTRICTS

(No. 7155—Alderman, 41st Ward—C. J. A.—September 29, 1931—2½ pp.)

The city may legally surrender all streets of a certain subdivision to a park district, but its feasibility is questionable. The power of park districts to make street improvements, and the amount of funds that they may lawfully spend for street purposes is limited and therefore, before turning any streets over to any park district, the City Council should carefully investigate and satisfy itself that the streets will be maintained in the proper repair and that the rights of the people in general will be subserved.

TRANSFER OF JURISDICTION OVER STREETS

(No. 6869—Acting Commissioner of Compensation—L. N. M.—April 21, 1931—5 pp.)

Where an ordinance transfers legal jurisdiction over a street to the West Chicago Park Commissioners and it is accepted by them, the commissioners assume legal jurisdiction over the maintenance of openings and risers in the sidewalk space on the street.

Citations:

Statute: SH '29, 24: 65.6, 65.8, 65.13, 65.19.

Ordinances: Coun. J. (1928-29), p. 3001, 3113.

Cases: Chicago v. Pittsburgh, Cincinnati, Chicago and St. Louis R. R., 242 Ill. 30 (1909).

South Park Commissioners v. Chicago City RR., 286 Ill. 504 (1919).

Other reference: Elliot, Roads and Streets, sec. 20, pp. 450, 451.

SURRENDER OF AVENUE TO SOUTH PARK BOARD

(No. 6928—Chairman, Committee on Finance—F. X. B.—June 3, 1931—1 p.)

If the city should turn over Michigan avenue between the bridge and Randolph street to the South Park Commissioners, this would vest the complete control of Michigan avenue in the South Park Board, and would effectively prevent the city from dealing with Michigan avenue either as a street by itself or in connection with other streets and other improvements without the consent of the park board.

CONSTRUCTION OF CONDUIT LINE BY PARK DISTRICT

(No. 6533—Commissioner of Public Works—B. J. K.—October 23, 1929—1½ pp.)

The West Park Commissioners must secure the passage of an ordi-

nance by the City Council before the Department of Public Works may grant to them a permit to construct a conduit line on city streets.

All persons or corporations desiring conduit space must have a franchise from the City Council authorizing such a conduit system.

Citation:

Ordinance: Code '22: 3722.

PIPE LINE CONNECTION FROM PARK DISTRICT TO CITY STREET

(No. 7703—Commissioner of Public Works—R. N.—August 9, 1932—2 pp.)

If a pipe line connection in the public streets of a park district from a fire line to a sprinkler system is approved by the Commissioner of Public Works, such installation may be made. The individual installing it and the park board would be liable for any damage consequent thereto.

If permission were granted to open streets controlled by the city to install a pipe line connection, the city would require an indemnity bond.

OBLIGATION OF PARK COMMISSIONERS UNDER LAKE FRONT ORDINANCE

(No. 7874—City Council—W. T. C.—January 3, 1933—2 pp.)

The city, under the lake front improvement ordinance, is entitled to payment from the South Park Commissioners for that portion of the condemnation award judgments against the city which represent damages to the remainders of parcels of land part of which was taken for the construction of the subway improvement.

Citation:

Ordinance: Coun. J. (1919-20), p. 969 (Lake Front Improvement ord.).

TITLE OF PARK COMMISSIONERS TO UNION PARK

(No. 7834—Mayor—C. N.—December 13, 1932—5½ pp.)

The West Chicago Park Commissioners' possession of Union Park most likely could not be successfully challenged.

The extending of Randolph street and Washington boulevard through Union Park, being a simple exercise of the state's right of eminent domain, did not violate the "park purposes condition" of the original deed of grant.

The erection of a police station on the premises of Union Park, being within the police power, does not violate the original deed, unless the entire park be devoted to police activities.

The meeting of socialists and communists in Union Park would not seem to be a violation of park purposes, unless some clause of the original deed made express provisions against certain political adherents.

Citations:

Statute: SH '29, 105: 169.

Ordinances: Code '56, ch. 45, sec. 1.

Hoover, Spec. Ord. (1915), p. 373.

Cases: *People v. Marin County*, 103 Cal. 223, 37 Pac. 203, 26 L. R. A. 659 (1894).

Bessemer Land and Improvement Co. v. Jenkins, 111 Ala. 135, 18 So. 565 (1895).

Grogan v. Town of Hayward, 4 Fed. 161 (1880).

Other reference: Burdick, Real Property, sec. 216.

JURISDICTION OF LAWRENCE PARK COMMISSIONERS IN LAWRENCE AVENUE CRIB

(No. 7986—*Commissioner of Public Works—J. F. G.—March 30, 1933*
—1½ pp.)

The Lawrence avenue crib, which has been abandoned and is now completely surrounded by sand fill, is entirely within the jurisdiction of the Lincoln Park Commissioners and it is their duty to take all necessary precautions to prevent injuries to persons and property which might result from the depreciation and disintegration of the crib.

(3) Board of Education

BOARD OF EDUCATION, STATUS—DEBT LIMIT OF CITY

(No. 6794—*City Comptroller—C. J. A.—October 31, 1930—8 pp.*)

The Board of Education is a corporation separate and distinct from the city, and has the power to incur its own debts.

Bonds issued by the Board of Education are not a part of the cor-

porate indebtedness of the city, within the meaning of the constitutional debt limitation provision.

Citations:

Constitution: Illinois, art. IX, sec. 12.

Statutes: SH '29, 122: 153, 162.

Ill. Laws (Sp. sess. 1930), p. 98.

Cases: Wade v. East Side Levee District, 320 Ill. 396 (1926).

People v. Healy, 231 Ill. 269 (1907-08).

People v. Reinberg, 263 Ill. 536 (1914).

Wilson v. Board of Education, 233 Ill. 464 (1908).

Mathews v. Board of Education, 342 Ill. 120 (1930).

Other references: Op. Corp. Counsel (1920-23), p. 752.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of October 28, 1930, referring to the question of the issuance of Board of Education working cash fund bonds and note your request for an opinion as to whether these bonds, when sold, will be a debt of the City of Chicago, within the meaning of the constitutional debt limit of such city. In reply thereto, we beg to submit the following opinion:

The constitutional provision fixing a debt limitation for municipal corporations is section 12 of article 9 of the Constitution. * * *

* * * * *

You will note thus that this section contemplates that school districts as well as cities, townships and other municipal corporations may incur indebtedness, and the limit set is the same percentage for each of such corporations and the indebtedness of the one is not added to the indebtedness of the other. Thus, for instance, the power of the county to incur indebtedness is wholly independent of and is not limited by any indebtedness which cities and other municipalities within the county may have incurred for their corporate purposes. Wade v. East Side Levee District, 320 Ill. 396.

The City of Chicago is a municipal corporation organized under the Cities and Villages act. The Board of Education is a separate and distinct corporation organized under an entirely different statute, namely the School Law.

Section 128 of the School Law as amended (Smith-Hurd Statutes 1929, chapter 122, section 153) reads in part as follows: "Section 128. Each city having a population exceeding 100,000 inhabitants shall constitute one school district which shall maintain a thorough and efficient system of free schools which shall be under the charge of a Board of Education, which shall be a body politic and corporate, by the name of 'Board of Education of the City of', and by that name may sue and be sued in all courts and places where judicial proceedings are had."

* * * * *

Our Supreme Court has on numerous occasions called attention to the fact that the Board of Education (which is the Chicago School District) is a separate and distinct corporation from the city.

In the case of People ex rel Post v. Healy, 231 Ill. 269; which was a case involving the power of the Mayor to remove members of the Board of Education, our Supreme Court in discussing the relation between the city and the Board of Education called attention to the fact that prior to the adoption of our present Cities and Villages act in 1872, school affairs were managed by the City Council as an integral part of the city government, but that under our present law, they are managed by the Board of Education which is organized under an entirely different act from the

Cities and Villages act and constitutes a separate corporation from that of the city.

* * * * *

To the same effect is *The People ex rel v. Reinberg*, 263 Ill. 536, where the Supreme Court also held that the Mayor of the City of Chicago had no power to remove the members of the Board of Education; that while they were to be appointed by the Mayor with the advice and consent of the City Council, yet this was merely a convenient mode for their appointment and did not make them subject to the Mayor or City Council in the discharge of their duties, but that when once appointed, the Board of Education, constituting as it did a separate and distinct corporation, was as independent of the Mayor and City Council as though they had been elected by the people rather than appointed in the peculiar mode prescribed by the statute.

As to the general power of the Board of Education in the management and control of school affairs, our Supreme Court said in *Wilson v. Board of Education*, 233 Ill. 464: "By act of the General Assembly, the public schools of the City of Chicago are under the control of the Board of Education, and it is given all power and authority required for the proper management of the schools, with power to enact such ordinances as may be deemed necessary and expedient for such purposes."

It is true that the City Council and the city officials are entrusted with a few duties pertaining to the Board of Education, but it will be noted that these duties are not conferred upon the City Council and city officials by the Cities and Villages act under which the city is organized, but by the school act under which the Board of Education is organized as a corporation. In other words, in performing those duties, the city officials are merely acting as agents of the Board of Education and not as agents of the city in the strict sense.

Relative to the power of the Board of Education, it is further provided in section 139 of the law as amended (Smith-Hurd Statutes 1929, chapter 122, section 162) as follows: "The specifications of the powers herein granted are not to be construed as exclusive, but the Board of Education shall exercise all the powers that may be requisite or proper for the maintenance and fullest development of an efficient public school system not inconsistent with those general provisions of the school law of the state which apply to all school districts."

By section 132 of the School Act, the Board of Education was given express power to issue bonds for certain purposes; and, at the recent special session of the legislature, an amendatory act was passed, authorizing the Board of Education to establish a working cash fund, through the issuance of bonds (Session Laws, Special Session 1930, pp. 98, 99). The validity of this amendatory act was, on October 25, 1930, sustained by the Supreme Court, in the case of *Matthews v. Board of Education*, and, as you stated in your letter, the act specifically provides: "Said bonds shall be issued in the corporate name of the school district."

Since, therefore, the Board of Education is a separate and distinct corporation from the City of Chicago, organized under and by virtue of a different statute from that under which the city is organized, and since the statute specifically provides that these bonds shall be issued in the corporate name of the school district, and since the constitutional provision in question contemplates that school districts may incur indebtedness just as well as the cities and other municipal corporations, therefore we are of the opinion that the bonds so issued by the Board of Education are not and will not be held by the courts to be any part of the corporate indebtedness of the City of Chicago within the meaning of the constitutional debt limitation provision. In fact, we do not believe that the bonded indebtedness of the Board of Education is any more an obligation of the

City of Chicago than, for instance, the bonded indebtedness of the Lincoln Park Board or the South Park Commissioners would be so considered.

* * * * *

Board of Education as Corporate Body: The Board of Education of the City of Chicago was created by a statute of 1917 and made a body politic and corporate. As a body corporate it was empowered to levy taxes and issue bonds for school purposes; it has its own debt limit which is not affected by the indebtedness of the city.—*Board of Education v. Upham*, 357 Ill. 263 (1934).

POWER OF BOARD OF EDUCATION TRUSTEES—CONTROL OVER SCHOOL TAX LEVY

(No. 7899—*L. H.*—January 13, 1933, 2½ pp.)

Trustees of the Board of Education are appointed by the Mayor but after their appointment they have entire management of school affairs.

The City Council is required to make a tax levy for schools, but only upon demand of the Board of Education and in accordance with the board's budget; the Council's act is merely ministerial.

The Mayor and Comptroller are by statute required to countersign school warrants.

Citation:

Statute: School act, secs. 128, 134½, 135½, 136.

PAYMENT OF EDUCATION EXPENSES BY CITY

(No. 8276—*Chairman, Committee on Finance—L. H.*—January 17, 1934—5 pp.)

The city cannot turn over liquor license receipts or any of its other funds to the Board of Education or any other corporate body to enable that body to pay its expenses.

Citations:

Cases: *Washingtonian Home v. Chicago*, 157 Ill. 414 (1895).
People v. City Treasurer, 215 Ill. 43, 71 (1905).

BOARD OF EDUCATION APPROPRIATIONS

(No. 7462—*L. H.*—February 26, 1932—2½ pp.)

The City Council acts in a purely ministerial capacity when it passes the budget of the Board of Education. The Council does not have to reappropriate or reitemize the various appropriations made by the board, but must merely include in the Council appropriations a lump sum appropriation for educational purposes, and similar lump

sum appropriations for school building, textbook, school pension, playground and other purposes for which separate taxes are required.

Citations:

Statute: School act, secs. 135, 135½.

Case: Koelling v. People, 196 Ill. 353 (1902).

BOARD OF EDUCATION APPROPRIATIONS

(No. 7066—*City Comptroller—L. H.—August 10, 1931—2 pp.*)

To be valid, an appropriation or expenditure of school monies must be passed only at a regular meeting of the Board of Education and by a vote of not less than a majority of the full membership of the board.

BOARD OF EDUCATION TAX LEVY

(No. 8042—*Chairman, Committee on Finance—L. H.—April 31, 1933—3½ pp.*)

The City Council may pass the tax levy ordinance for the Board of Education before the city's annual appropriation ordinance or the city's tax levy ordinance.

The City Council, upon demand and under direction of the Board of Education, is required to levy annual school taxes.

Citations:

Statutes: Otis act (1917), (Board of Education).

City and Villages act, art. VIII, sec. 1.

STATUS AND POWERS OF BOARD OF EDUCATION—CONTROL OF FUNDS*

(No. 6466—*City Treasurer—J. W. B.—July 10, 1929—8 pp.*)

As the Board of Education of Chicago is a separate and distinct municipal corporation, funds obtained by the board through taxation or the sale of tax anticipation warrants are school funds. The City Treasurer as *ex officio* School Treasurer must keep those funds separate from the city funds and subject to the absolute direction and control of the Board of Education.

When the City Council has not designated any place as a depository for school funds, the City Treasurer may use his own discretion or follow the directions of the Board of Education as to those banks in which the school funds should be deposited.

Citations:

Ordinances: Code '22: 32, 33, 80.

Case: Chicago v. Board of Education, 246 Ill. App. 405 (1927).

*See also Opinion No. 6803, p. 126, "Treasurer's Handling of School Funds."

CONTROL OF PROCEEDS OF EDUCATION TAX WARRANTS

(No. 7526—City Comptroller—L. H.—April 4, 1932—4 pp.)

When the Board of Education receives money as the result of the city purchasing its tax anticipation warrants, the board has the right to determine for itself what it will do with the money. The board can be prevented from using the money in a certain way, only if it applies the money to a purpose which is not a lawful educational one.

AMOUNT OF ISSUE OF EDUCATION TAX WARRANTS

(No. 7545—City Comptroller—L. H.—April 14, 1932—2½ pp.)

If the Board of Education wishes to issue tax anticipation warrants, it should request the City Council to order the issue. Should the Council order this issue, the Mayor and comptroller could refuse to sign them for an amount greater than the comptroller estimates will be within the limitation imposed by the law.

Where the resolution of the Board of Education and a City Council ordinance direct the issuance of a greater amount of tax anticipation warrants than the law permits and the comptroller inadvertently allows them to be issued, he might perhaps point to the action of the Board of Education as an excuse; but where he discovers beforehand that such action would result in an excessive issue, he is bound to halt proceedings in order that the necessary correction may be made.

Citation:

Statute: SH '31, 122: 155 (School act).

**ISSUANCE AND CONTROL OF EDUCATION TAX WARRANTS—
CERTIFICATES OF INDEBTEDNESS**

(No. 6985—City Comptroller—L. H.—July 3, 1931—8 pp.)

The City Comptroller may issue tax warrants for which he has not received the equivalent in cash for deposit with the City Treasurer, but, in the absence of any direction to the contrary, he may not deliver or turn over the warrants to anyone else except for cash.

The City Comptroller and the Mayor may, upon direction of the Board of Education, legally deposit with the secretary of the Board of Education tax warrants issued against levies of the Board of Education despite the fact that neither the City Comptroller nor the Mayor have received any cash for those tax warrants from the secretary of the Board of Education.

The Board of Education, by its direction to the City Council to cause the tax warrants to issue, has not lost all control over the warrants. It may limit the amount to be issued, the time when they are to be sold, and say that the duly executed warrants should be placed in the hands of a trustee over whom it has control.

Neither the Board of Education nor the city are authorized by statute to issue certificates of indebtedness, and, if the certificates are held illegal by the court, they might be repudiated by the Board of Education or the city and then the parties who accepted them would be left to the original claim without any evidence of the same in their hands.

Citations:

Statute: School act, sec. 132.

Case: City of Sanford v. Chase National Bank, 50 F (2nd) 400 (1931).

ISSUANCE AND INTEREST RATE OF EDUCATION TAX WARRANTS

(No. 7286—Mayor—L. H.—November 10, 1931—5½ pp.)

While it is desirable to have the Board of Education take action in regard to the sale of Board of Education tax anticipation warrants before the City Council passes an ordinance relating thereto, the passage of such an ordinance by the City Council first, when followed by a ratification of the Board of Education, is lawful.

The interest rate on Board of Education tax anticipation warrants can be fixed by the Board of Education after the City Council has passed an ordinance authorizing the sale of these warrants upon the condition of the increased rate of interest being authorized by the Board of Education.

Citation:

Ordinance: Coun. J. (1931-32), pp. 959, 1129 (Board of Education tax anticipation warrants ord.).

COMPTROLLER'S RESPONSIBILITY FOR EDUCATION TAX WARRANTS

(No. 7525—City Comptroller—L. H.—April 1, 1932—6½ pp.)

The only responsibility of the comptroller for warrants of the Board of Education is to see that they are in proper form and that they do not exceed the amount in those funds of the treasury against which the warrants are drawn. Where a warrant on its face is obviously drawn for an improper purpose, the comptroller may properly

refuse to countersign it, but the exact limits of his discretion in this respect, are difficult to define.

The Comptroller is justified in acting on the order of the City Council to purchase 1931 Board of Education tax warrants from monies in "aggregate of funds." When that act is done, however, the money must be deposited in the school fund, and it becomes at once subject to the orders of the Board of Education.

The Comptroller has practically no discretion or responsibility whatever in the matter of countersigning tax anticipation warrants of the Board of Education. He may determine only the amount that may lawfully be issued.

The new budget law of the Board of Education, while requiring unpaid liabilities of previous years to be provided for in the succeeding budget, does not contemplate a tax levy for those unpaid liabilities, and no such levy would be lawful.

Citations:

Statutes: School act, sec. 132, 135.
SH '31, 24: 117.

Board of Education Bond Issue: A writ of mandamus was issued to compel the City Comptroller to countersign a \$25,000,000 bond issue of the Board of Education to augment its working cash fund, as this issue is not beyond the debt limit of the board and is otherwise valid.—Board of Education v. Upham, 357 Ill. 263 (1934).

. CONTROL OVER EDUCATION TAX WARRANTS

(No. 7067—Mayor—L. H.—August 11, 1931—3½ pp.)

An ordinance providing for the sale of school board anticipation warrants or for higher interest rate on the same, must be passed upon by the Board of Education to become effective.

The Mayor and Comptroller merely act as ministerial officers in countersigning Board of Education tax anticipation warrants for the purpose of placing them in trust with the secretary of the Board of Education.

In investing city funds, the City Treasurer does not act as *ex officio* school treasurer.

SIGNING OF EDUCATION TAX WARRANTS

(No. 7938—City Comptroller—L. H.—February 10, 1933—3 pp.)

The vice president of the Board of Education may lawfully sign tax anticipation warrants of the board in the capacity of vice president until a new president is elected.

Where no statute requires a public officer to hold over until his successor is chosen and qualified, his duties cease when his term is ended or when his resignation is accepted, and there is then a vacancy in the office.

Citations:

Case: *People v. Brundage*, 296 Ill. 197 (1921).

Other reference: 46 CJ 971.

Board of Education Tax Warrants: The board of education of any school district in any city having a population exceeding 500,000 inhabitants is authorized to issue bonds to pay tax anticipation warrants where the taxes anticipated have not been collected.—Ill. Laws (3rd. Spec. sess., 1934), p. 241.

Tax anticipation warrants are payable from the taxes collected and the Board of Education cannot appropriate funds or issue bonds for the payments of such warrants as this would not be for a corporate purpose.—*Berman v. Board of Education*, 360 Ill. 535 (1935).

MONEY TRANSFERS BETWEEN FUNDS OF BOARD OF EDUCATION

(No. 6903—*City Comptroller—L. H.—May 18, 1931—6½ pp.*)

There is no irregularity or inconsistency caused by applying money derived from "taxes levied" for the common school fund for the year 1929 to a fund made up of "money derived" from the common school fund for the year 1930 to reimburse a loan from that fund.

The clause in the Working Cash Fund statute, "the amount of money which the Board of Education estimates will be derived for any year from the common school fund of the State," should be construed to mean the actual money it will receive in any year and not the taxes which will be levied in that year.

Money transferred to the working cash fund of the Board of Education out of money "derived from the common school fund for any year" may be reimbursed from taxes levied for the purposes of the common school fund for the previous year.

Citations:

Statutes: Ill. Laws (1929), p. 25.

SH '29, 122: 233, 234.

SIGNATURE BY PROXY OF EDUCATION WARRANTS AND BONDS

(No. 7788—*Secretary, Board of Education of Chicago—L. H.—October 20, 1932—2 pp.*)

A resolution by the Board of Education approving the action of the president of the board in selecting a certain individual to be his proxy

to sign bonds, warrants, certificates, and other instruments is a necessary part of the selection of the proxy.

Citation:

Statute: SH '31, 122: 151a.

NATURE OF BOARD OF EDUCATION SCRIP

(No. 7078—*Secretary, Board of Directors, Chicago Public Library*—*L. H.*—*August 18, 1931*—2½ pp.)

Although there is no positive prohibition against the issuance of scrip, scrip that is issued by the Board of Education is not payment under the law, and has no legal significance further than that it is an evidence of indebtedness; it is not a negotiable instrument.

Acceptance of Board of Education scrip by the Library Board does not amount to a payment and the Library Board would still be in a position to demand payment.

LIABILITY OF TREASURER AND COMPTROLLER IN PAYING EDUCATION WARRANTS

(No. 6977—*City Comptroller*—*L. H.*—*June 30, 1931*—7½ pp.)

The law imposes no duty upon the Comptroller and City Treasurer beyond the ordinary caution necessary to determine, when paying out money on warrants presented by the Board of Education whether those warrants are in good form and signed by the proper officers. All other responsibility with regard to the warrants rests with the Board of Education, which must determine for itself whether it is drawing on the proper fund for a proper and lawful purpose.

Citations:

Statutes: Ill. Laws (1917), p. 724, sec. 135.

SH '29, 24: 117, 126.

WITHHOLDING PAYMENTS FROM SCHOOL FUND DUE TO CONTRACTOR'S LIEN

(No. 8505—*City Treasurer*—*J. F. G.*—*September 20, 1934*—1½ pp.)

Any person furnishing materials, etc., to any contractor having a contract for public improvements for any school district has a lien on the money due such contractor under such contract and the City Treasurer, as ex-officio treasurer of the Board of Education, must withhold a sufficient amount of the money due the contractor from school funds to cover the amount of such claim until the claim is settled.

Citation:

Statute: SH '33, 82: 23.

WITHHOLDING PAYMENTS FROM SCHOOL FUND DUE TO CONTRACTOR'S LIEN

(No. 8504—Comptroller—J. F. G.—September 20, 1934—2 pp.)

Any person furnishing materials, etc., to any contractor having a contract for public improvement for any school district has a lien on the money, bonds or warrant due such contractor under such contract and the responsibility of withholding money from the school fund due to such lien rests with the Board of Education but not with the City Comptroller.

Citations:

Statutes: SH '33, 82: 23.
Id. 122: 158.

PROTECTION OF HEALTH OF SCHOOL CHILDREN

(No. 7540—President, Board of Health—C. J. A.—April 12, 1932—6½ pp.)

A child who has been ill for a day or more and absent from school on that account, is presumed to remain ill until the contrary is shown or until, by lapse of time or otherwise, a contrary presumption is established.

The school authorities have the right to know how ill a sick child is, what his ailment is, and whether his presence will endanger the health of the other children in the school.

The school authorities are chargeable with the care of school children and must see that they are not unnecessarily exposed to contagion and disease. The protection of the legal rights of one child, therefore, cannot be extended to the point of making him a menace to other children with whom he is associated in school.

The Board of Education has the right to make arrangements with the Board of Health to assist in the protection of the health of school children.

The payment of a fee for a physician's examination would not constitute the payment of a fee to the Board of Education for the privilege of attending school.

Citations:

Cases: Burroughs v. Mortenson, 312 Ill. 163 (1924).
Western Stone Co. v. Whalen, 151 Ill. 472 (1894).
New York Central Railroad Co. v. Lehigh Stone Co., 220 Ill. App. 563 (1921).
School Trustees v. People, 87 Ill. 303 (1877-78).
Rulison v. Post, 79 Ill. 567 (1875).

INSPECTION OF EDUCATION BUILDINGS AND ELEVATORS

(No. 6512—City Comptroller—C. W. K.—September 19, 1929—8 pp.)

The city, under its police power, has control of the inspection and safety requirements of the elevators and the buildings of the Board of Education of the city and may require a fee for this inspection service.

Citations:

Case: *Chicago v. Board of Education*, 246 Ill. App. 405 (1927).

Other reference: *Op. Corp. Counsel* (1923-25), p. 24.

INSPECTION OF EDUCATION SCALES

(No. 7424—City Sealer—C. J. A.—January 18, 1932—2 pp.)

The city has a right to collect fees for inspecting scales of the Board of Education.

Citation:

Case: *Chicago v. Board of Education*, 246 Ill. App. 405 (1927).

APPOINTING EMPLOYEES AND AWARDED CONTRACTS FOR BOARD OF EDUCATION

(No. 7564—Mayor—L. H.—May 4, 1932—4 pp.)

The appointment of employees is included among the general powers conferred upon the business manager of the Board of Education, but this power is subject to the control of the board, which has in fact, taken control of these appointments.

The Board of Education may change its rules at any time to provide that some other officer be given charge of employment.

The attorney for the Board of Education does not have authority to award contracts, but can merely pass upon their form.

Citations:

Statute: SH '31, 122: 152, 153.

Administrative rules: Rules of the Board of Education, ch. III. sec. 1-4.
Id., ch. VI, sec. 1, 4.
Id., ch. VII.

Opinion No. 7563 of May 4, 1932 to the Mayor is in accord with the above opinion.

REMOVAL OF EXECUTIVE OFFICERS OF BOARD OF EDUCATION

(No. 7951—Mayor—L. H.—February 20, 1933—3 pp.)

The legislature may, if it sees fit to do so, amend the School act in such a way as to dismiss the present incumbents of executive of-

fices of the Board of Education, such as the business manager, attorneys, and superintendent, without abolishing the position.

Citations:

Constitution: Illinois, art. IV, sec. 28.

Statute: School act, sec. 129.

Cases: People v. Coffin, 285 Ill. 344 (1919).

People v. Dreher, 302 Ill. 50 (1922).

Other references: 46 CJ 984.

SALE OF SCHOOL PROPERTY—SALE OF CITY PROPERTY

(No. 7893—*City Comptroller—L. H.—January 10, 1933—6½ pp.*)

The city holds school property in trust and only the City Council can sell such real estate or any interest therein, upon written request of the Board of Education, ordered by a vote of not less than three-fourths of the board's full membership.

Advertisement of a sale of school property must be published for at least three successive weeks.

The City Council may sell real estate owned by the city when there is a three-fourth vote of all its members at a regular meeting or at a special meeting called for such purpose that such property is no longer required for the use of the city.

Bids for the sale of school property must be opened at a regular meeting of the City Council.

Citations:

Statutes: SH '31, 24: 511-512.

Id., 122: 156.

Ordinance: Coun. J. (1932-33), p. 3130.

Other references: Proceedings of Board of Education, Oct. 22, 1932, pp. 315-316.

Id., Nov. 8, 1932, p. 370.

LEASE OF SCHOOL LAND FOR MUNICIPAL AIRPORT

(No. 6725—*Chairman, Committee on Finance—R. N. L.—July 22, 1930—9 pp.*)

The Board of Education has a right to lease school grant land to the city for a municipal airport, and the board has the right to lease such property at an annual rental of less than 6% of its appraised value, provided that proper consideration is shown in the lease for so doing.

The rights of the city as to the appointment and power of its appraisers should be made coextensive with that of the Board of Edu-

cation in the lease for a municipal airport. Other protective clauses in the lease should be inserted.

Citations:

Constitution: Illinois, art. VIII, sec. 2.

Statute: SH '29, 122: 156.

Cases: Bradley v. Case, 4 Ill. 585 (1841-42).

Chicago v. Tribune Co., 248 Ill. 242 (1911).

EXCHANGE OF SCHOOL PROPERTY

(No. 6565—*Chairman, Chicago Plan Commission*—R. N. L.—*December 12, 1929*—12½ pp.)

The exchange of Board of Education property in section 16 of a township for city property likewise in section 16 of a township is legal, since the property acquired by the Board of Education will constitute proceeds received from section 16 property, will be impressed with the same trust with which the previous section 16 property was impressed, and will constitute a part of common school property.

Citations:

Statutes: SH '29, 122: 240-253 (School lands) as amended.

Id., 30: 156, 157 (Transfer of real estate between municipal corporations).

Cases: Bradley v. Case, 4 Ill. 585 (1842).

Chicago v. Tribune, 248 Ill. 242 (1911).

People v. Chicago, 216 Ill. 537 (1905).

Phelps v. Harris, 101 U. S. 370 (1879).

(4) *Sanitary District*

INSPECTION FEES FOR SANITARY DISTRICT SEWER WORK

(No. 7532—*Chairman, Committee on Finance*—L. H.—*April 7, 1932*—4½ pp.)

The fact that the Sanitary District is a municipal corporation does not affect the rights of the city to regulate and control the opening of city streets. The city has a legal right to charge and collect fees for the inspection of work done by the Sanitary District of Chicago on the sewers of city streets.

Citations:

Statute: SH '31, 24: 65.8-65.19.

Case: Kreigh v. Chicago, 86 Ill. 407 (1877).

Other reference: Op. Corp. Counsel (1907-08), p. 17.

OPINION OF FOREGOING SYNOPSIS

Your letter under date of April 2, 1932, relative to claim of Sanitary District of Chicago that it is not subject to the payment of inspection fees

on sewer work in the city streets, was referred to the writer for consideration and reply.

You state that the Committee on Finance has under consideration a proposed settlement of certain bills of the city against the Sanitary District of Chicago and of certain bills of said Sanitary District against the city, and that among the bills are items for services of city street inspectors who covered certain sewer work done in the city's streets, which the city inspected.

You further state that the claim is made by the Sanitary District that because it is a distinct municipal unit it is unnecessary for it to obtain permits from the city for opening up streets for the purpose of construction work and that it is not subject to charges for city inspection. You ask to be advised whether the city had the legal right to make the inspections in question and whether the said fees are collectible.

The claim made on behalf of the Sanitary District is not a new contention. Similar questions have arisen from time to time over a period of years. The law department of the city has always consistently held that the fact that the Sanitary District is a municipal corporation does not affect the right of the city to regulate and control the opening of the city's streets. A very carefully considered opinion was written on the subject under date of May 15, 1908, which you will find in the volume of Opinions of the Corporation Counsel and Assistants covering the period from April 15, 1907, to December 31, 1908, p. 17. What we have to say in this opinion will be substantially the same thing as is said in the opinion to which we refer you, and we are merely applying the law therein stated to the case in hand.

It is true that the Sanitary District of Chicago is a municipal corporation and derives its authority and powers from the same source as the City of Chicago. In the matters placed within its jurisdiction it is a municipal corporation of equal dignity with the City of Chicago. But, like all municipal corporations, its powers and authority are limited to those expressly conferred by statute or necessarily implied from the powers so granted. The two municipal corporations are separate and distinct and each possesses powers that the other cannot encroach upon.

There is, however, no delegation of power to the Sanitary District under which it is given regulation or control of streets. That is a function which is expressly conferred on cities and villages by sections 9 to 20 of article V of the Cities and Villages act. Section 13 is particularly applicable to the subject in hand.

* * * This power is not affected by any act of the legislature granting authority to the Sanitary District, and therefore it relates to sewers built by the Sanitary District as well as by any others. The importance of exercising this power by the municipality has always been recognized. Thus, it was held in *Kreigh v. City of Chicago*, 86 Ill. 407, where a somewhat similar controversy between the city and the Chicago West Park Commissioners was involved, that the authority to keep streets in repair is one that the city is not deprived of and must enforce even though it yielded control of the street for boulevard purposes to the park commissioners.

* * * It will thus be seen that the city is charged with the duty and responsibility of regulating openings in the streets for the purpose of building or-repairing sewers. It has undertaken to do this by providing, among other things, for inspection by the city's officers and employees. For this it has the undoubted right to charge a fee. The fact that the Sanitary District is a municipal corporation with certain powers in respect to building sewers does not absolve it from the payment of such fees. As stated by the Supreme Court, in the above case, before the Sanitary District can claim this immunity, thus asserting the "extraordinary authority" of having

the right to ignore the city's regulation, it must "prove it by the clear letter of the law."

We are therefore of the opinion that the city had the legal right to make the inspection charges in question and that they are collectible. * * *

LEGISLATIVE CONTROL OF APPOINTMENT OF SANITARY DISTRICT OFFICIALS

(No. 8842—Mayor—J. F. G.—August 9, 1935—2½ pp.)

The state legislature can determine the method of appointment to any office of the state, county, or city created by its authority and not by the State Constitution.

The Sanitary District, being a creature of the state with authority to employ attorneys, the legislature may determine that the members of the Sanitary District's law department shall be appointed pursuant to the Civil Service act.

Citations:

Statute: Hurd '11, 34: 62 (10, 12, 20).

Case: McAuliffe v. O'Connell, 258 Ill. 186 (1913).

PROPERTY TRANSFER TO CITY BY SANITARY DISTRICT

(No. 8696—Acting Commissioner of Streets and Electricity—M. H. F.—March 7, 1935—3 pp.)

In the transfer of property from the Sanitary District to the city the question of whether the consideration shall be five dollars or one dollar is one for determination by negotiation and agreement between the Sanitary District and the city, as either would be sufficient to support the transfer.

CONTRACT OF SANITARY DISTRICT TO SUPPLY CITY ELECTRICITY—REPLACING ELECTRICAL EQUIPMENT

(No. 7300—Commissioner of Gas and Electricity—C. J. A.—November 16, 1931—3 pp.)

Since the contract between the city and the Sanitary District regarding the replacement of electrical equipment in substations due to a change in the source of feed provides that the Sanitary District is to do the work, the work should not be stopped merely because of a dispute between the city and the Sanitary District as to the payment of the cost of the work.

CONTRACT OF SANITARY DISTRICT TO SUPPLY CITY ELECTRICITY—REPLACING ELECTRICAL EQUIPMENT

(No. 6912—*Commissioner of Gas and Electricity—J. W. B. S.—May 22, 1931—10½ pp.*)

The city is under no legal obligation to the Sanitary District because of a change in the electric system in operation to replace the present equipment in its electric substations which are furnished with electricity under contract with the Sanitary District.

The city is under no liability to reimburse the Sanitary District for equipment which it may install in the city's substations, and the claim of the district for reimbursement for equipment already installed is of very doubtful validity.

SURRENDER OF PUMPING STATION BY SANITARY DISTRICT TO CITY

(No. 7886—*City Comptroller—O. W. H.—January 6, 1933—3½ pp.*)

By the agreement of July 8, 1926 providing for the surrender of the Lawrence Avenue pumping station to the city by the Sanitary District, the city is obligated to take over all responsibilities of the Sanitary District arising out of the switch track ordinance of January 19, 1917 and the switch track agreement of February 1, 1917 for construction and maintenance of the track connecting the station to the tracks of the Chicago, Milwaukee and St. Paul Railway. Neither the Sanitary District nor the city is obliged to remove the switch track in question by the terms of the agreement of February 1, 1917.

Citations:

Ordinances: Coun. J. (1930-31), pp. 4227, 4229.

Id., (1916-17), vol. II, p. 2943 (Sanitary District switch track construction ord.).

Council orders: Coun. J. (1926-27), p. 4019 (Agreement concerning the surrender of the Lawrence avenue pumping station).

(5) *Exposition Authorities*

STATUS AND LIABILITY OF CHICAGO EXPOSITION OFFICIALS

(No. 8892—*President, Chicago Exposition Authority—M. H. F.—October 10, 1935—6½ pp.*)

The Chicago Exposition Authority is an agency of the state and a public corporation with limited powers whose commissioners and

officers have the status of public officers with no specific liability placed on them by the act creating the Authority.

The commissioners and officers of the Chicago Exposition Authority assume no personal liability under their bonds, or otherwise, to carry out the terms of the ground lease between the Authority and the Chicago Park District, so long as they act in good faith within the scope of the powers conferred upon them by law and without negligence.

The official bonds provided for in the act creating the Chicago Exposition Authority are general fidelity bonds for the faithful performance of the duties of the commissioners and the secretary of the Authority, and these officials are not subject to personal liability.

Citations:

Statutes: ISBS '35, 32: 548-552.

Id., 105: 149.

Cases: Augusta v. Augusta Water District, 101 Me. 148, 63 Atl. 663 (1906).

Duncan v. Niles, 32 Ill. 532 (1863).

Other references: 1 Bouvier, Law Dictionary (Rawle's 3rd rev.), p. 374 "body corporate."

1 Words and Phrases (2nd series) 1052, "body politic."
8 CJ 1137.

46 CJ 1042.

2 McQuillin, Mun. Corp. (2nd ed.), sec. 560.

Century of Progress: The Century of Progress Exposition is authorized to conduct a "Chicago World's Fair" in 1934 to celebrate the beginning of the new century in the history of Chicago.—Ill. Laws (3rd. sp. sess., 1933-34), p. 209.

CENTURY OF PROGRESS SAFETY AND FIRE PROTECTION

(No. 8059—*Chief Fire Marshal*—W. L. S.—May 15, 1933—6 pp.)

Responsibility for the safety of persons and property during construction of A Century of Progress Exposition and during the period it is open to the public lies entirely with the South Park Commissioners.

The Chief Fire Marshal should come to a clear agreement with the officials of A Century of Progress Exposition and the South Park Commissioners that, in case the Chicago Fire Department is called to assist in fighting a fire at A Century of Progress Exposition, the Chief Fire Marshal or his representative shall be in supreme command.

BATHING BEACHES OF CENTURY OF PROGRESS—RIGHTS OF CITY AND CHICAGOANS

(No. 7663—*City Council*—J. F. G.—July 26, 1932—3½ pp.)

The South Park Commissioners had authority, under statute, to grant to the Century of Progress the use of the bathing beach in the

vicinity of 12th street including the right to charge admission fees and the Century of Progress had the right to sublet that privilege to any concessionaire.

The lake front development ordinance does not reserve to the city and people of Chicago the free use of any of the bathing beaches required to be established by that ordinance.

Citations:

Statute: SH '29, 105: 327t (Century of Progress Exposition).
Ordinance: Coun. J. (1919-20), p. 969 (Lake front ord.).

LICENSING POWERS OVER CENTURY OF PROGRESS

(No. 8051—*Superintendent, Bureau of License—M. H. F.—May 12, 1933—4 pp.*)

For the period of the World's Fair, A Century of Progress Exposition has exclusive jurisdiction over the regulation and licensing of beverage parlors, food establishments, and public places of amusement within the territory of the Exposition.

Citations:

Statutes: Ill. Laws (1929), p. 559.
Id. (1933), p. 518 (Malt and Vinous Beverage act).
Ordinance: South Park ord., passed April 16, 1930.
Council order: Coun. J. (1932-33), pp. 3322-23.

ISSUANCE OF AUTO EMBLEMS OF CENTURY OF PROGRESS

(No. 7124—*President, A Century of Progress—J. F. G.—September 15, 1931—1 p.*)

If the Century of Progress Exposition desires to issue emblems for automobiles, some emblem should be adopted which does not have the appearance of a star, so as not to simulate a badge of official authority in violation of the laws of the state and the ordinances of the city.

CENTURY OF PROGRESS STICKER ADVERTISEMENTS ON AUTOS

(No. 8090—*C. N.—June 8, 1933—2 pp.*)

The advertisement of products in conjunction with A Century of Progress Exposition announcement by means of transparent automobile stickers is not obnoxious to the state statutes, and since Illinois is a common law state, those stickers probably would meet with no objections in other states.

E. RELATIONS WITH OTHER CHICAGO AUTHORITIES

(1) *Tuberculosis Sanitarium*

CONTROL OF TAX LEVY, PERSONNEL AND APPROPRIATIONS OF SANITARIUM

(No. 6993—Chairman, Committee on Efficiency, Reorganization, and Consolidation—L. H.—July 8, 1931—6½ pp.)

The various branches of the city government which are specifically provided for by statute possess no greater powers than the express powers conferred by the act creating them, and all other powers remain in the City Council.

The Board of Directors of the Municipal Tuberculosis Sanitarium expends the monies which have been collected and placed within its control, but it cannot of its own motion make appropriations or a tax levy to maintain the sanitarium. The tax must be levied by the City Council.

The directors of the Municipal Tuberculosis Sanitarium have power to appoint and remove employees, but the City Council has a supervisory power because, through its control of appropriations, it may establish or abolish positions.

The City Council has discretionary power with regard to the tax levy ordinance for the Municipal Tuberculosis Sanitarium except that the tax levy may not exceed a certain amount.

Citations:

Statute: SH '29, 24: 542.

Cases: Koelling v. People, 196 Ill. 353 (1902).

People v. Chicago, 310 Ill. 534 (1924).

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of the 1st inst., regarding the powers the City Council over the Municipal Tuberculosis Sanitarium. You state that the committee has requested an opinion on three matters which you set forth in your letter, all of which relate to the Municipal Sanitarium, which you say is "supposed to be a separate body."

The Municipal Tuberculosis Sanitarium is a branch of the city government provided for specifically by statute. There are a number of branches of the city government thus specifically provided for, and their powers and duties vary. To illustrate, the Board of Education is created a body corporate and politic, and it comes very near being a separate municipal government, while some of the other branches, such for instance, as the Board of Directors of the House of Correction, are practically the same as one of the general departments of the city government, the only difference being that they are created by statute instead of being created by ordinance as are the general departments of the city government. There is no rule which

governs all of these various branches created by statute, except that it may be said generally that none of them possess any greater powers than the express powers conferred under the act creating them, and that all other powers with respect to the same remain in the corporate authorities of the City of Chicago, that is to say, in the City Council.

Your first question is—"What power, if any, has the City Council over the budget of the Municipal Tuberculosis Sanitarium?"

Section 1 of the Sanitarium act (Smith-Hurd 1929 Statutes, page 460) provides that the City Council "shall have the power, in the manner hereinafter provided, to establish and maintain a public sanitarium and branches." The Council also has the power to levy the tax. There are provisions for the appointment of directors, and the duties and powers of such directors are defined, but there is nothing which indicates that the said Board of Directors will have any power with respect to levying taxes further than to make its recommendation in writing to the City Council for that purpose. The very fact that the word "recommendation" is used in the statute in this connection indicates that a supervisory discretionary power is lodged in the City Council. The directors have the control of funds that are provided for by the City Council.

* * * * *

While the statute authorizes the Board of Directors to make the expenditures after the monies have been collected and placed within the control of the board, it cannot of its own motion make appropriations so as to provide for a tax levy for the purpose of maintaining the institution. It must make its estimates and submit them to the City Council. The statute also authorizes such board to appoint employees, but this authority is on a par with the authority of the heads of a general department of the city government to make appointments in his department. It is always subject to the control of the City Council with respect to appropriations therefor and creations of positions therein. This is made clear not only by the fact that there are no special provisions authorizing such directors to provide for positions, except as they are appropriated for, but by the further requirement that the service is included within the classified service under the Civil Service law. Such being the case, it is not to be inferred that the directors of the sanitarium have the right to adopt their own budget without regard to the sanction of the City Council.

A reasonable construction of the law is that the directors of the sanitarium will not be required to itemize their expenditures for the budget to such an extent as the head of one of the regular departments of the city government, but there will have to be sufficient itemization to enable the City Council to act intelligently on the requirements of the sanitarium. The rule to be followed in that respect is probably the one that was laid down in the case of *Koelling v. People*, 196 Ill. 353, which defined the duty of the City Council under the old school law, when the school board was in practically the same situation as the directors of the Municipal Tuberculosis Sanitarium. It was held in that case that the provision requiring the itemization of expenditures in the appropriation and tax levy ordinance held with respect to the school board, but that where the said ordinances provided for specific sums of money under two separate headings, one for new buildings and sites, and the other for educational purposes, it was a compliance with the statute, and it was not necessary that the ordinance should separate into minor items the amounts required for these purposes. If it had been the intention of the legislature that the directors of the tuberculosis sanitarium should be entirely free from the supervision of the City Council with regard to its budget, it would have undoubtedly provided so in the act, as it did in the case of the Municipal Court of Chicago, where it was held that, because the act provided expressly for the method in which the judges were to determine on their expenses, the City Council had

nothing to do with their budget. (See *People ex rel. Egan v. City of Chicago*, 310 Ill. 534.)

While there has been no decision of a reviewing court concerning the power of the City Council over the budget of the Municipal Tuberculosis Sanitarium to which we can point, we are of the opinion that the decisions of our Supreme Court in analogous cases justified the conclusion that we have expressed on this point.

The next question you ask is—"What power, if any, has the City Council, to abolish or to establish positions at the Municipal Tuberculosis Sanitarium, as said sanitarium is supposed to be a separate body?"

* * * * *

The directors of the sanitarium have the power of appointment and removal of employes, but the City Council has such supervisory control by reason of its power of making appropriations that the right to establish positions or to abolish them exists in the City Council. We again call attention to the distinction there is between provisions for appointment of employes in the Municipal Court act and the provision for appointment of employes in the Sanitarium act. Under the Municipal Court act the sections applicable thereto provide that the bailiff and the clerk should appoint deputies of such number and at such salaries as might be fixed from time to time by orders signed by a majority of the judges and spread upon the records of the court, the salaries to be payable out of the city treasury in monthly installments. This, it will be noted, is a very distinct method prescribed for making appointments and fixing salaries, which cannot be disturbed by the City Council.

Your third question relates to the discretionary power in the matter of the tax levy ordinance for the Municipal Tuberculosis Sanitarium. You ask whether the City Council has such discretionary power. This has already been answered above. It is quite plain from the text of the act itself that a discretionary power is lodged in the City Council, because the act does not confer discretion as to the amount of appropriations on the directors of the Municipal Tuberculosis Sanitarium. It merely provides for a maximum beyond which the City Council cannot go in levying the tax. Therefore, the discretion must be lodged in the City Council, which, as also stated, is given the direct power to establish and maintain the sanitarium and to levy a tax therefor. Where it is provided that the City Council may levy a tax not to exceed a certain amount, the discretionary power to limit the tax to some other amount within that maximum is clearly implied.

CONTROL OF FINANCES OF TUBERCULOSIS SANITARIUM

(No. 7717—Chairman, Committee on Finance—L. H.—August 15, 1932—5 pp.)

The Municipal Tuberculosis Sanitarium is a branch of the city government under the control of the City Council. The Council has the right and power to supervise the making of its budget and to make changes therein when changes are regarded as necessary. After the appropriations are duly made, the expenditures are under the control of the Board of Directors of the sanitarium.

Citations:

Statutes: SH '31, 24: 547.
Id., 37: 370, 372.

Cases: *People v. Chicago*, 310 Ill. 534 (1924).

APPOINTMENT OF DIRECTORS OF SANITARIUM

(No. 7452—Mayor—J. F. G.—February 17, 1932—1½ pp.)

As one of the members of the Board of Directors of the Municipal Tuberculosis Sanitarium must be a member of the Board of Health, the appointment of a third member, who is not a member of the Board of Health, to the Board of Directors of the Municipal Tuberculosis Sanitarium, when neither of the other two members of that board are members of the Board of Health, is illegal.

Citations:

Statute: Cah. '31, 24: 588.

Ordinance: Coun. J. (1931-32), p. 1517.

ABOLITION OF CIVIL SERVICE POSITIONS OF SANITARIUM

(No. 6918—Director of the Municipal Tuberculosis Sanitarium—F. J. V.—May 26, 1931—4½ pp.)

The Board of Directors of the Municipal Tuberculosis Sanitarium may abolish a civil service position. The directors should exercise this power by introducing at a regular meeting an ordinance which declares the abolition of the position, and place in the record of their proceedings the vote on the passage of the ordinance. The reasons for abolishing the position should be stated in the ordinance, and a copy of the record of the ordinance and its passages should be certified by the directors and forwarded as an official report to the City Council. This formal report should be presented to the City Council in a regular meeting, be formally accepted and approved, and published in the Council Journal of Proceedings.

Citations:

Statute: Cah. '29, 24: 591.

Cases: People v. Chicago, 337 Ill. 100 (1930).

People v. Coffin, 282 Ill. 591 (1918).

Chicago v. Luthardt, 191 Ill. 516 (1901).

SIGNING WARRANTS OF TUBERCULOSIS SANITARIUM

(No. 6893—City Comptroller—L. H.—May 5, 1931—3½ pp.)

Warrants of the Municipal Tuberculosis Sanitarium that are drawn on the Treasurer must be signed by the Mayor and the Comptroller.

Citation:

Statutes: SH '29, 24: III, 547.

APPROPRIATIONS FROM SANITARIUM RESERVE FUND

(No. 8330—*President, Municipal Tuberculosis Sanitarium*—L. H.—*March 13, 1934—3½ pp.*)

The City Council can appropriate from the Municipal Tuberculosis Sanitarium reserve fund of uncollected taxes from previous years to meet the expenses for 1934.

Citation:

Statute: SH '33, 24: 102.

SUPPLEMENTARY TAX FOR TUBERCULOSIS SANITARIUM

(No. 8844—*Mayor*—J. F. G.—*August 10, 1935—3 pp.*)

The city has the power to levy an additional tax between July 1 and September 1, 1935, for the year 1934 as well as the year 1935 for the Municipal Tuberculosis Sanitarium.

Citations:

Statutes: Cities and Villages act, art. VIII, sec. 1.

Ill. Laws (1935), p. 505.

Revenue act, sec. 122.

TUBERCULOSIS SANITARIUM'S LIABILITY AS LESSEE

(No. 7135—*Chairman, Committee on Finance*—B. F. K.—*September 17, 1931—3½ pp.*)

Where notice was given by The Chicago Municipal Tuberculosis Sanitarium to its lessor that it would vacate the leased premises so that the lessor had sufficient time to take ordinary precautions to preserve the vacated property, the sanitarium is liable, if at all, only for the balance of rent due from the date the premises were vacated to the termination of the lease, and is not liable for any damage caused by vandals during such period.

(2) *Public Library*

STATUS OF LIBRARY BOARD—ISSUE OF TAX WARRANTS

(No. 8479—*City Comptroller*—J. F. G.—*July 25, 1934—3½ pp.*)

The Board of Directors of the Chicago Public Library, the Board of Trustees of the Municipal Tuberculosis Sanitarium, and the Retirement Board of the Firemen's Annuity and Benefit Fund are not separate municipal corporations but are corporate authorities of the city to carry out particular functions of the city government assigned to them.

The City Council may take action for the reissuance of tax anticipa-

tion warrants against the tax levies of the three funds of the corporate authorities referred to above without any request from the respective boards.

The City Council must secure the approval of the Board of Education for the reissuance of tax anticipation warrants.

Citations:

- Statutes: Firemen's Annuity and Benefit Fund act, sec. 6(e), 11.
SH '33, 146½: 2.
Ill. Laws (1933-34), p. 125.
"Act Concerning Municipal Funds," June 5, 1911, as amended.
School act, sec. 132¼.

OPINION OF FOREGOING SYNOPSIS

Reference is made to your letter asking for an opinion as to whether the Public Library Board, the Municipal Tuberculosis Sanitarium and the Fireman's Annuity and Benefit Fund Board are required under the law to pass a resolution making request upon the city officials before the council passes an enabling ordinance for the reissuance of tax anticipation warrants held by the City Treasurer.

Neither the law authorizing the establishment of the public library nor the law authorizing the establishment of the Municipal Tuberculosis Sanitarium has any provision affecting the subject of tax anticipation warrants. The only sections of the statute providing for the creation of the Firemen's Annuity and Benefit Fund which touch the subject of tax anticipation warrants are section 6, sub-paragraph (e) which authorizes the retirement board to invest monies of the annuity and benefit fund in tax anticipation warrants issued by the city, and section 11 which provides that if the funds available for the purposes of this act shall be insufficient during any year to meet the requirements of this act the city may issue tax anticipation warrants as provided by law against the tax levy herein provided for the current fiscal year. The last provision is merely a reiteration of section 2 of an act entitled "An Act to provide for the manner of issuing warrants upon the treasurer of the state or of any county, township, city, village or other municipal corporation and jurors' certificates," approved June 27, 1913, as amended (Smith-Hurd's Revised Statutes, 1933, chap. 146½, sec. 2).

The Board of Directors of the Chicago Public Library, the Board of Trustees of the Municipal Tuberculosis Sanitarium and the Retirement Board of the Firemen's Annuity and Benefit Fund of the City of Chicago are more closely related as departments of the city government than is the Board of Education. The act entitled "An Act concerning municipal funds," approved June 5, 1911, as amended, applies to every county, city, park district, sanitary district, incorporated town or village or other municipal corporation separately. The boards referred to in your request for an opinion are not separate municipal organizations but are corporate authorities of the city to carry out particular functions of the city government assigned to them. Section 3 of the act relating to municipal funds, as amended by an act approved May 11, 1934 (Laws of Illinois, 58th General Assembly, First, Second and Third Special Sessions 1933-1934, p. 125) provides:

"If at any time it shall be deemed necessary or expedient to convert into money any tax anticipation warrants theretofore issued and purchased by public funds pursuant to the provisions of section 1 of this act, before receipt of the taxes in anticipation of which the warrants were issued, the governing body of any such county, city, park district, sanitary district, incorporated town or village or other municipal corporation issuing such warrants, by ordinance or resolution, may authorize a resale of such warrants and adjust the interest rate thereon,

or as permitted by applicable statute may authorize the issuance and sale of a like principal amount of new warrants for the same purpose and in anticipation of the same taxes as such original warrants were issued and bearing any date subsequent to the date of such original tax anticipation warrants, such new tax anticipation warrants to be of the denomination and bear interest not to exceed the statutory rate, all as may be authorized by such ordinance or resolution. In the case of any city constituting a school district, the city council thereof is required annually to levy all school taxes, the issuance of such new warrants in the anticipation of school taxes, or the resale of such original warrants with adjusted interest rate, shall be approved by the board of education of such school district. * * *

It is manifest from the foregoing provision that the City Council is required to secure the approval of the Board of Education for the reissuance of tax anticipation warrants just as in the first instance under the provisions of section 132¼ of the school law the Board of Education must request the City Council to order original tax anticipation warrants to be issued. No such provisions are to be found which apply to the Board of Directors of The Chicago Public Library, the Board of Trustees of the Municipal Tuberculosis Sanitarium and the Retirement Board of the Firemen's Annuity and Benefit Fund.

We are of the opinion therefore that the City Council may take action for the reissuance of tax anticipation warrants against the tax levies of the three funds referred to without request from the respective boards created to manage the affairs of the Chicago Public Library, the Municipal Tuberculosis Sanitarium and the Firemen's Annuity and Benefit Fund.

CONTROL OF LIBRARY FUND

(No. 6805—Deputy Comptroller—C. J. A.—November 25, 1930—
4½ pp.)

The directors of the Public Library have exclusive control over any monies credited to the Library Fund, which they may draw upon and expend as they see fit.

Citations:

- Statute: SH '29, 81: 5 (Library act of 1872, sec. 5).
Cases: People v. Florville, 207 Ill. 79 (1904).
Chicago v. County of Cook, 136 Ill. App. 120 (1890-91).
Taylorville Sanitary District v. Winslow, 317 Ill. 25 (1925).
People v. Chicago, 321 Ill. 466 (1926).

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your recent letter in regard to the expenditures of the Chicago Public Library building fund account No. 600-1 as shown on page 907 of the "Council Journal" of January 3, 1930 in which the City Council purported to appropriate from the library fund the sum of \$396,000.00 for building purposes and purchase of buildings and sites and equipments of buildings. We note your further statement that this appropriation has now been exhausted, but that the directors of the Chicago Public Library contend that they have the right to use certain additional monies credited to said library fund and you ask an opinion from the Corporation Counsel in regard to this matter.

Section 5 of the Library act of 1872 (Smith-Hurd Statute, 1929, chapter 81, section 5) in defining the powers of the directors of the Public Library, provides:

"They shall have exclusive control of the expenditures of all monies

collected to the credit of the library fund, and of the construction of any library building, and of the supervision, care and custody of the grounds, rooms or buildings constructed, leased or set apart for that purpose. All monies received for such library shall be deposited in the treasury of said city to the credit of the library fund, and shall be kept separate and apart from other monies of such city, and drawn upon by the proper officers of said library, upon properly authenticated vouchers of the library board. Said board shall have power to purchase or lease grounds, or to purchase, lease, erect or occupy an appropriate building or buildings for the use of said library. When a building erected or purchased by the board is not adapted to its purposes or needs, the board may remodel or reconstruct such building, said board may also, with the approval of the city council, board of trustees, or board of town auditors, as the case may be, sell or otherwise dispose of any real or personal property that it deems no longer necessary or useful for library purposes."

In our opinion, when the statute says that the directors of the Public Library "shall have exclusive control of the expenditure of all monies collected to the credit of the library fund," it means precisely what it says, and we believe that this language is so plain as to leave no room for doubt. If then the directors of the Public Library have exclusive control of the expenditures of all moneys belonging to the library fund, it can only mean that they are not subject to the orders or direction either of the City Council or any other public body or public officials in the expenditure of such funds, but that such directors have the sole right to determine how and for what purpose such monies shall be expended.

It is true that the City Council has the power to appropriate money for or into the library fund and to levy a tax for that purpose, but after the money has once come into the library fund or been accredited to the same, it is beyond the control of the City Council, and the directors of the library board are the persons who are in control over the same.

It is true that the Public Library Board is a part of the government of the City of Chicago (People v. Florville, 207 Ill. 79; City of Chicago v. County of Cook, 136 Ill. App. 120), but it is a semi-independent branch of the city government. It is also true that the library funds are city funds, in a broad sense of the term, but they are funds established for a special purpose and placed under the control of a special board. Apparently, it was the intention of the legislature in passing the Library act that the public library and its management should be taken out of politics as that term is popularly understood, and for that reason, the legislature saw fit to take away from the City Council all power of management of the library fund (except the power to establish and replenish the same) and vest the same in a special board. Whether in doing so, the legislature acted wisely or not is of course a matter with which we have no concern. It is sufficient to say that they did so by the act in question. Under our constitution, the residuary power of the government is vested in the legislature and it has in general full power to delegate powers of local government to whatever subordinate body or board it sees fit. Taylorville Sanitary District v. Winslow, 317 Ill. 25; People v. City of Chicago, 321 Ill. 466.

It will further be noted that the statute above quoted provides that all monies received for such library shall be deposited in the treasury of the city to the credit of the library fund and drawn upon by the proper officers of said library upon properly authenticated vouchers of the library board. No other public body or public officials have any authority to appropriate or draw any money from such library fund. In our opinion, therefore it is in this case simply a question of whether there is any money in the City Treasury belonging to the library fund. If there is, it is subject solely to the order of the library board in whom the exclusive control thereof has been vested.

For the reasons above stated, we are of the opinion that any monies

in the City Treasury credited to the library fund is subject to the exclusive control of and may be drawn upon by the directors of the Public Library and that the City Council has no control over the same.

LIBRARY BOARD'S CONTRACT AWARDS

(No. 7811—*Secretary, Board of Directors, Chicago Public Library—C. J. A.—November 18, 1932—2½ pp.*)

A contract awarded by the Board of Directors of the Public Library to a corporation of which one of the library directors is an officer is illegal and void.

Citation:

Statute: SH '31, 102: 3 (Corrupt Practices act, sec. 3, 4).

Cases: Sperry v. People, 314 Ill. 205 (1925).

Peabody v. Sanitary District, 330 Ill. 250 (1928).

INTEREST ON DEBTS OF PUBLIC LIBRARY

(No. 7924—*Secretary, Board of Directors, Chicago Public Library—Jud. G.—February 2, 1933—2 pp.*)

The Board of Directors of the Chicago Public Library has no legal right to allow and pay interest on money due the creditors of the library.

A municipal corporation is not liable to pay interest unless there is an express agreement therefor.

Citations:

Cases: County of Madison v. Bartlett, 2, Ill. 71 (1832).

Pekin v. Reynolds, 31 Ill. 529 (1863).

EXPENDITURES FROM LIBRARY BUILDING FUND

(No. 8124—*Secretary, Chicago Public Library—L. H.—July 20, 1933—3 pp.*)

Replacement of books in existing library buildings or additions to the stocks of books now in the library cannot be made from the building fund for the Chicago Public Library.

Citation:

Statute: Library act, sec. 1 (as amended, 1925).

STATUS OF HIGH SCHOOL BRANCH LIBRARY EMPLOYEE

(No. 7075—*Secretary, Board of Directors of Chicago Public Library—L. H.—August 17, 1931—2½ pp.*)

Employees who are appointed by the library board, assigned to library work in high school branches, paid by the library board out

of its funds, subject to the orders of the library board, whose services are billed by the library board to the school board, are Public Library employees and may look to the library board for their salary payments.

(3) *Municipal Court*

MUNICIPAL COURT'S DEBT INCURRING POWERS

(No. 7507—Mayor—L. H.—March 23, 1932—2½ pp.)

The Municipal Court judges are corporate authorities for the purposes of incurring indebtedness for the expenses of the court.

Citations:

Statutes: SH '31, 38: 792-797.

PURCHASES FOR MUNICIPAL COURT

(No. 7598—Mayor—L. H.—June 7, 1932—3½ pp.)

Purchases for the Municipal Court may be made by the officers of the court, and the City Council cannot compel them to make purchases through a channel of its own choosing. But the officers of the court may avail themselves of the facilities of the city's Bureau of Purchasing, if they desire to do so.

Citation:

Statute: Municipal Court act, secs. 6, 8, 15, 17, 44.

POWER OF CITY COUNCIL TO ALTER COURT COSTS

(No. 7959—Mayor—L. H.—March 3, 1933—2½ pp.)

The City Council has the power to alter charges for costs in the Municipal Court, provided that the action is taken by an ordinance passed by a two-thirds vote and upon the recommendation of two-thirds of the judges of that court. The recommendations submitted by the judges must be either accepted or rejected, and may not be changed. It should be in the form of the ordinance prescribed by the Cities and Villages act.

Citations:

Statutes: Cities and Villages act, art. V, sec. 103.

Ill. Laws (1931), pp. 428, 433 (Amendment of 1931 to the Municipal Court act of 1905, secs. 56, 58).

Municipal Court Costs: The amendment to the Municipal Court act which authorizes the City Council to determine the amount of the costs to be paid by parties litigant in the Municipal Court is constitutional.—People v. Gill, 358 Ill. 261 (1934).

FILLING VACANT OFFICE OF COURT JUDGE

(No. 6825—City Clerk—C. J. A.—January 9, 1931—2 pp.)

Where more than a year remains of the term of a vacant office of an Associate Judge of the Municipal Court, the vacancy should be filled at the next April election, the calling of a special election being unnecessary.

The City Clerk should receive, file and certify to the Board of Election Commissioners any petitions for the vacancy of the office of Associate Judge of the Municipal Court, if they appear on their face to comply with section thirty of the Primary act and section nine of the Municipal Court act.

Citations:

Statutes: Cah '29, 37: 397.
Id., 46: 460.

PENSION PAYMENTS OF COURT CHIEF JUSTICE

(No. 7747—City Comptroller—L. H.—September 16, 1932—2½ pp.)

The law does not expressly require that the City Comptroller obtain the Civil Service Commission's approval of the pension to be paid the former Chief Justice of the Municipal Court, but that approval is in accord with the established practice.

Citations:

Statutes: SH '31, 37: 551.
Id., 24½: 70, 71.
Ordinances: Coun. J. (1932-33), p. 2280.

**POSITIONS OF JUSTICES OF PEACE, CONSTABLES, POLICE
MAGISTRATES**

(No. 8029—Mayor—J. F. G.—April 24, 1933—1½ pp.)

The offices of justices of the peace, police magistrates, and constables for territory within Chicago, were expressly abolished by the Municipal Court act.

An amendment to the Municipal Court act consented to by a vote of the people would be necessary to provide for the election or appointment of police magistrates in the City of Chicago.

Citations:

Statutes: SH '31, 37: 357, 420.
Cases: Lott v. Davis, 264 Ill. 272 (1914).
Holmes v. Straus, 283 Ill. 621 (1918).
People v. Chicago, 310 Ill. 534 (1924).

APPROVAL BY COMPTROLLER OF COURT PAYROLL

(No. 8115—*City Comptroller—L. H.—July 13, 1933—2½ pp.*)

The Comptroller should not pass payrolls for Municipal Court judges which do not contain deductions specified in the appropriation bill of 1933 even though the total of such payrolls would not exceed the amount appropriated.

Citation:

Ordinance: Coun. J. (1932-33), p. 413 (1933 Appropriation ord.).

CONTROL OF COURT SALARIES AND PAYROLLS

(No. 7689—*City Comptroller—L. H.—August 3, 1932—4½ pp.*)

The salaries of employees of the clerk of Municipal Court must correspond to the annual salary appropriation and deductions in such salaries cannot be eliminated through economies in other expenditures.

Municipal Court judges are municipal officers and their salary must be the full salary fixed by law at the time of their election to their respective terms.

Although a legal right to a full salary may exist, the Comptroller is bound to observe the limits of the salary appropriation for each position and must not approve payrolls in excess of the appropriation. The remedy of the office holder is in the courts.

Citations:

Constitution: Illinois, art. IX, sec. 11.

Other reference: Dillon, Mun. Corp. (5th ed.), sec. 425.

CONTROL OF SALARIES OF COURT EMPLOYEES

(No. 7045—*City Comptroller—L. H.—July 31, 1931—2 pp.*)

The Municipal Court, acting through its judges, may raise the salaries of the switchboard operators employed by the bailiff of said court, and the City Council must appropriate for such increases.

Citation:

Case: *People v. Chicago*, 310 Ill. 534 (1924).

CONTROL OF SALARY OF PROBATION OFFICERS

(No. 7506—*Mayor—L. H.—March 23, 1932—2½ pp.*)

The compensation of probation officers appointed by the Municipal Court of the city can probably be determined by the judges of the court.

Citation:

Case: *People v. Chicago*, 310 Ill. 534 (1924).

PAYMENT OF JUDGES' SALARIES BY COURT ORDER

(No. 8181—City Comptroller—L. H.—September 29, 1933—4 pp.)

A court order to compel payment in full of the salaries of the Municipal Court justices upon presentation of the payroll by the Chief Justice of the Municipal Court must be complied with to the extent that the appropriation will reach, even though the appropriation is insufficient to pay all salaries, but a failure to issue warrants for the payments of the above salaries where no monies are available in the corporate fund would not place the Comptroller in contempt of court as a statute prohibits the issue of warrants in such case.

Citations:

Statute: SH '33, 146½: 1.

Cases: Christian Hospital v. People, 223 Ill. 244 (1906).
People v. McBeeney, 259 Ill. 161 (1913).

Municipal Court Salaries: A writ of mandamus was issued to compel the City Council to make additional appropriations for salaries of deputy bailiffs of the Municipal Court. By statute the Municipal Court judges have power to determine the number and salaries of its deputy bailiffs and the City Council must make the proper appropriations therefor.—People v. Chicago, 244 Ill. App. 66 (1927).

A writ of mandamus was issued to compel the City Council to make an additional appropriation to pay the salaries of probation officers of the Municipal Court in accordance with the state statute designating minimum salaries for probation officers. Such statute does not contravene the constitutional prohibition that the state may not impose taxes upon municipalities for corporate purposes since the purpose of probation is not local in character.—People v. Chicago, 351 Ill. 396 (1933).

Municipal Court judges have been held to be "municipal officers" and their salaries could not be reduced during their term of office by the City Council. A writ of mandamus was issued to compel the necessary appropriations.—People v. Chicago, 360 Ill. 25 (1935).

JURY SERVICE PAYMENTS

(No. 7838—City Comptroller—C. N.—December 15, 1932—1½ pp.)

The duty of preparing checks in the payment of Municipal Court jury service for 1935 is imposed by statute on the County Comptroller and not on the City Comptroller.

Citation:

Statute: Ill. Laws (1931), p. 426 (Petit Jurors).

Municipal Court Jury Costs: A writ of mandamus was granted on petition of the People on the relation of the city to compel the county to pay jurors of the Municipal Court their statutory fees.—People v. Board of County Commissioners, 355 Ill. 244 (1934).

PREFERENCE TO INDIGENT PERSONS FOR JURY SERVICE

(No. 7810—*Executive Secretary, Illinois Emergency Relief Commission—F. J. B.—November 16, 1932—2 pp.*)

A plan which would give indigent persons preference as jurors is a violation of state law.

Citations:

Statutes: SH '31, 78: 13, 31.

CHAPTER II

THE CITY AND ITS OFFICES

INTRODUCTORY

The City of Chicago operates under the Council-Mayor form of government. By this is meant that primary responsibility for governing the city rests with a legislative body and a chief executive—a City Council and a Mayor—both elected by the municipal citizenry.

The legislative body, the City Council, consists of fifty aldermen elected from their fifty respective wards. These aldermen are elected for a four-year term and exercise general supervisory legislative control over the city government. The Council itself is divided into special committees for considering the different types of legislation, and some of these committees employ permanent staffs which furnish technical and research aid and make for continuity of policy.

On the administrative side there is the executive head, the Mayor, elected from the city at large for a four-year term. Subordinate to him are the thirteen administrative departments, the heads of which are appointed by the Mayor with the approval of the City Council. These include the Departments of Law, Finance, Public Works, Police, Fire, Building, Streets and Electricity, Public Service, Weights and Measures, Steam Boiler Inspection, Smoke Inspection and Abatement, Medical Examination and Emergency Treatment and the Board of Health. In addition, there are a large number of boards and commissions such as the Civil Service Commission, the Zoning Board of Appeals, and the Chicago Plan Commission. Likewise, a Municipal Reference Library is included in the governmental setup.

In its earlier history the departments of Chicago were directed by boards composed of elected officials. Integration of administrative organization took place during the year 1867 when the election of department heads was abandoned and the power of appointment was given to the Mayor. Centralization of responsibility in city departments was brought about by substituting single executive heads for boards in the years immediately following 1876. Thus, since the beginning of the last quarter of the nineteenth century, there have been accepted in Chicago administration the principles of integration and centralized responsibility. There are some exceptions, of course, such as the board at the head of health administration and the popular election of such officials as the City Clerk and the City Treasurer.

Attention should be called to the fact that integration and cen-

tralization did not take place in one stroke, but has been a continuing process into the present. Furthermore it has extended below the rank of department head into the departments themselves. For example, as recently as 1935, an ordinance was enacted breaking down the divisional isolation of the city's legal offices and integrating their functions in a single Law Department.

The following opinions give some picture of the administrative and legislative responsibilities in Chicago government. Since these opinions were offered as solutions to particular problems, they naturally do not give so perfect a picture as would come from an organized description of the subject. Nevertheless, even though the problems which arise are specific or exceptional in character, they are related to the routine functioning of the city government and from them one can obtain a fair picture of how the city and its offices operate.

A. GENERAL RIGHTS AND OBLIGATIONS OF CITY OFFICIALS*

ELIMINATION OF CITY OFFICES

(No. 7065—Acting Fire Commissioner—F. J. V.—August 8, 1931—1 p.)

An office, as distinguished from a position or place of employment, cannot be eliminated except by a vote of two-thirds of all the aldermen elected, by ordinance or resolution, to take effect at the end of the fiscal year.

Citations:

Ordinances: Code '22: 1274.
Coun. J. (1924-25), p. 3078.
Statute: Cah. '29, 24: 76.

SALARY OF OFFICIALS AND EMPLOYEES AS RELATED TO SERVICES RENDERED

(No. 6755—Fire Commissioner—C. J. A.—August 16, 1930—5½ pp.)

The salary of a public official is regarded not as a *remuneration* for services, but as a *perquisite* of the office, and the lawful holder of an office is entitled to the salary attached to it regardless of the amount of services rendered.

No positive rule of law exists compelling the City Council to treat all employees with absolute equality, especially where there is some reasonable basis for a distinction.

The city has no authority to pay employees or officers employed by the day for any time when they are in the employ of the state, for that would amount to an appropriation of money for a non-corporate purpose.

The City Council has power to grant a leave of absence with pay to any city employee working for an annual salary who is a member of the state or national military or naval bodies for time he serves at the annual encampment, on a cruise of instruction, or on temporary duty.

Citations:

Statutes: SH '29, 24½: 49.
Cities and Villages act, art. V, secs. 1, 2.
Cases: Bullis v. Chicago, 235 Ill. 472 (1908).
People v. Coffin, 279 Ill. 401 (1917).
Andrews v. Portland, 79 Me. 484 (1887).
People v. Brady, 262 Ill. 578 (1914).
Elsenan v. Chicago, 334 Ill. 78 (1929).
Chicago v. M. & M. Hotel Co., 248 Ill. 264 (1911).

*See Opinion No. 7132, p. 130 on the acceptance of new official bonds of city officers.

HOLDING ANOTHER OFFICE BY CITY OFFICIAL

(No. 6814—*Deputy Comptroller—C. J. A.—December 18, 1930—15 pp.*)

If city officials can discharge the duties of their city office while serving in the state legislature, they are entitled to the salary attached to the city office as well as their state salary.

While certain municipal officers are forbidden by statute to hold certain other offices at the same time, there is no general rule of law that bars a person from holding two offices simultaneously.

Citations:

Constitution: Illinois, art. IV, secs. 3, 9.

Statute: Cities and Villages act, art. XII, sec. 3.

Cases: People v. Mahoney, 13 Mich. 481 (1865).

State v. Jarrett, 17 Md. 309 (1861).

Lamb v. Lynd, 44 Pa. St. 336 (1863).

In re Gunn, 50 Kan. 155, 32 Pac. 470 (1893).

People v. Hall, 80 N. Y. 117 (1880).

Fekete v. City of East St. Louis, 315 Ill. 58 (1928).

Chicago v. Luthardt, 191 Ill. 516 (1901).

Bullis v. Chicago, 235 Ill. 472 (1908).

People v. Bradford, 267 Ill. 486 (1915).

Other references: Cooley, Const. Limitations (7th ed.), p. 189.
46 CJ 941.

Opinion No. 8294 of February 9, 1934 to the Mayor discusses the same point as the above opinion.

LIBEL AGAINST CITY OFFICIALS

(No. 7486—*City Comptroller—L. H.—March 9, 1932—4½ pp.*)

A municipal corporation cannot avail itself of an action for libel for libelous charges against its officials.

Citation:

Case: Chicago v. Tribune Co., 307 Ill. 595 (1923).

LIBEL CHARGES AGAINST CITY OFFICIAL

(No. 7880—*Mayor—January 4, 1933—L. H.—2 pp.*)

In defense of an action of criminal libel, a city official making charges that an individual designated by name has been guilty of a criminal act, may be forced to prove not only that the charges are true but also that his motive in publishing the charges is justified.

Justification against libel charges does not always consist in the truth of the statements.

HANDLING OF MUNICIPAL FUNDS BY CITY OFFICIALS

(No. 6882—*Acting Commissioner of Public Welfare—L. H.—April 30, 1931—2½ pp.*)

All municipal officers and employees must render an account of the municipal funds that they have handled; a failure to account will subject them and their sureties, if such officers have given bond, to an action by the city.

It is the duty of the Comptroller to demand an accounting of municipal funds.

CUSTODY AND REMOVAL OF PUBLIC RECORDS

(No. 6939—*Acting Commissioner, Department of Gas and Electricity—F. J. V.—June 8, 1931—1½ pp.*)

The records of motion picture operators are public records and should not be removed from the custody of the proper officer.

If these records are removed from such custody and their return is refused, mandamus will lie to compel the return.

GRANTING LEAVE OF ABSENCE BY DEPARTMENT HEAD

(No. 6887—*Acting Commissioner of Police—F. J. V.—May 1, 1931—1½ pp.*)

The granting of a leave of absence is within the discretion of the department head. He may also determine its length, but cannot allow it to exceed one year.

Citation:

Administrative rule: Civil Service Commission, Rule VIII, sec. 3.

LAY-OFFS BY CITY OFFICIALS AND CITY COUNCIL

(No. 7044—*Commissioner of Health—L. H.—July 31, 1931—3 pp.*)

A city official may lay off subordinates, in the interest of economy, for a period not exceeding 30 days, but Council action is necessary for a lay-off period of more than 30 days.

Citations:

Statute: Civil Service act, sec. 12.

Case: Thomas v. Chicago, 273 Ill. 479 (1916).

AID IN COLLECTING EMPLOYEES' DEBTS

(No. 8575—C. N.—November 28, 1934—2 pp.)

City officials cannot be charged with assisting in the collection of private debts incurred by municipal employees.

Citation:

Case: Merwin v. Chicago, 45 Ill. 133 (1867).

Opinion No. 6778 of September 26, 1930 to the Acting Commissioner of Police is in accord with the above opinion.

COPYRIGHTING LITERARY PRODUCT OF CITY OFFICIALS

(No. 7225—Mayor—J. F. G.—October 28, 1931—4½ pp.)

The city has no authority to obtain for itself a copyright upon any literary matter prepared by any city official in the course of his public duties, and the city, as the employer of an official who procures a copyright, is not entitled to any property right in that copyright.

Citations:

Ordinances: Coun. J. (1927-28), p. 2282.

Case: Callaghan v. Myers, 128 U. S. 617 (1888).

B. ELECTIONS**PLACING CANDIDATE'S NAME ON BALLOT**

(No. 6851—Mayor—F. D. A., J. L., E. C. H.—March 21, 1931—6½ pp.)

Candidates nominated by a caucus or a meeting of qualified voters under sections three, four and six of the Ballot act are legally entitled to have their names placed on the official ballot that is to be submitted to voters on election day and the Board of Election Commissioners cannot legally refuse to so place the names of these candidates.

The Primary act deals exclusively with the primary nominations of political parties and does not conflict with sections three, four and six of the Ballot act.

Citations:

Statutes: Ballot act, secs. 3, 4, 6, as amended, Ill. Laws (1929), p. 403.
Primary act, sec. 1, as amended, June 18, 1929.

Case: Stuart v. Carr, 328 Ill. 626 (1928).

Permanent Registration: A permanent registration system was established in cities under boards of election commissioners to become effective as to registration for the election to be held on the first Tuesday after the first Monday in November, 1936.—Ill. Laws (4th sp. sess., 1936).

Election Contests: The right to contest an election is purely statutory and where statutes designate the court in which such proceedings may be instituted, any court other than the one named is without jurisdiction to hear and determine such contest (dicta).—Litzelman v. Town of Fox, 285 Ill. App. 7 (1936).

CITY'S LIABILITY FOR ELECTION COSTS

(No. 8525—Comptroller—J. F. G.—October 17, 1934—6 pp.)

The city is liable to the county for an apportionment of the cost of printing ballots and the salaries of judges and clerks of election for an election which included the election of judges of the Municipal Court or other city officers.

Citations:

Statutes: SH '33, 46: 77, 77a, 289, 389.

Cases: People v. Chicago, 310 Ill. 534 (1924).

Bolles v. Prince, 250 Ill. 36 (1911).

People v. Bowman, 253 Ill. 234 (1912).

Johnson v. County of Winnebago, 256 Ill. 276 (1912-13).

REFERENDUM ON DAYLIGHT SAVINGS

(No. 8905—Alderman 4th Ward—F. V. M.—October 28, 1935—1½ pp.)

The question of daylight savings for the entire year, as a matter of public policy, can be placed on the ballot only by petition of the registered voters of the city in accordance with law, and the Board of Election Commissioners cannot print such ballots unless this requirement is followed.

Citation:

Statute: ISBS '35, 46: 461.

REFERENDUM OF STATUTE AT PRIMARIES

(No. 6593—City Council—L. H.—January 29, 1930—2 pp.)

To submit to the voters at a primary election a statute which requires a referendum of the voters "at the first general election in and for the whole city," the City Council should call a special election for the consideration of the statute to be held on the day of the primary.

Citations:

Statutes: Ill. Laws (1929), p. 208.

Cities and Villages act, art. XII, pt. 2, secs. 5, 7.

Opinion No. 6603 of February 17, 1930 to the City Council is in accord with the above opinion.

NOTICE OF SPECIAL ALDERMANIC ELECTION

(No. 8761—City Clerk—J. F. G.—May 6, 1935—2½ pp.)

One publication of the notice of a special aldermanic election at least forty days prior to the election, and if a supplementary election

is required, one publication of notice of that supplementary election twenty days prior to the holding of it, is legally sufficient.

Citations:

Statute: SH '31, 24: 59.

Ordinance: Coun. J. (1932-33), p. 2141.

Case: Central Illinois Service Co. v. Taylorville, 307 Ill. 311 (1923).

Aldermen: A general election of aldermen is to be held in 1935 and every four years thereafter. The term is to be four years. Referendum approved November 6, 1934.—Ill. Laws (1933), p. 219.

Ward Committeemen: The term of ward Committeemen in cities having a population of 200,000 or over has been increased to four years.—Ill. Laws (1935), pp. 805, 807.

C. CITY COUNCIL

(1) Powers

POWER OVER CIVIL SERVICE POSITIONS

(No. 6994—*F. J. V.*—July 8, 1931—2 pp.)

The City Council has power to create and abolish offices and places of employment, and to heighten or lower the character, responsibility, and salary of any office or place of employment created by it.

POWER TO ABOLISH POSITIONS—SALARY RIGHTS IN REINSTATEMENT

(No. 8432—*Chairman, Committee on Finance—Q. O'B., C. H. L.*—June 12, 1934—1½ pp.)

The City Council has the power to abolish permanently or temporarily positions and places of employment with the city, as that of special assessment clerk, by the failure to appropriate salaries therefor.

A clerk whose position was dropped from an annual appropriation bill but later reinstated, has no right to any salary for the intervening period.

POWER OVER EMPLOYMENT AND EXPENSES OF MUNICIPAL COURT

(No. 8275—*City Comptroller—L. H.*—January 17, 1934—7 pp.)

The City Council may authorize the employment of other employees in addition to the number specified in the Municipal Court act, and

incur other expenses in addition to those which the act specifically mentions.

Citations:

Constitution: Illinois, art. IV, sec. 34.

Statutes: SH '33, 37: 362, 363, 375.

Case: Chicago v. Reeves, 220 Ill. 274 (1906).

INTERPRETING CITY'S POWERS—REGULATING USE OF FOREIGN MADE MATERIALS

(No. 7953—*Secretary, Subcommittee on Building Code Revision—A. F. G.—February 23, 1933—3 pp.*)

The statutes granting powers to the city are to be strictly construed and when a reasonable doubt exists as to the power of the city, that doubt is to be resolved against the city.

The City Council does not have power to bar the use of foreign made building materials in Chicago.

Citations:

Statute: SH '31, 24: 65.

Cases: City of Rockford v. Nolan, 316 Ill. 60 (1925).

Chicago v. M. and M. Hotel Co., 248 Ill. 264 (1911).

Barnard and Miller v. Chicago, 316 Ill. 519 (1926).

CITY'S POWER OVER CHARITABLE SOLICITATIONS

(No. 7333—*Commissioner of Public Welfare—L. H.—December 1, 1931—1½ pp.*)

The city has no authority, under its delegated powers, to legislate on the subject of the solicitation of funds and other contributions for charitable or philanthropic purposes.

SPECIAL ORDINANCES—CREATION OF LODGING HOUSES

(No. 7295—*Commissioner of Public Welfare—C. J. A.—November 13, 1931—2 pp.*)

The only limitation upon the power of the City Council to pass local or special ordinances is that these special ordinances must be reasonable; classifications based upon natural distinctions are valid, while classifications based on arbitrary distinctions are invalid.

The city could lawfully establish lodging houses for drunkards or dope addicts or for elderly women, but it is doubtful as to whether it could establish a lodging house for "difficult" or "unemployable" women, since this classification seems arbitrary.

If the City Council establishes a lodging house for women in general, administrative officials have no authority to limit its use to only certain classes of women.

Citation:

Case: *People v. Thompson*, 341 Ill. 166 (1931).

PUBLICATION OF BUDGET AND LETTING CONTRACTS

(No. 7572—*Mayor—L. H.—May 10, 1932—3 pp.*)

The City Council in its discretion may direct any officer of the city to publish the budget.

The City Council, by a two-thirds vote, may let any kind of contract without advertising and without bidding, if it sees fit to so act.

Citations:

Statutes: SH '31, 24: 43, 129.

AMENDMENT OF ORDINANCE—REFUND OF FEES BY ORDINANCE

(No. 7320—*Commissioner of Health—L. H.—November 24, 1931—3 pp.*)

An ordinance of the city remitting fees due from an educational institution is valid.

An ordinance cannot be overridden by a Council order, since an act of equal dignity is necessary to accomplish this purpose.

Citation:

Statute: SH '29, 120: 2.

POWER TO APPOINT CITY GREETER

(No. 6995—*Mayor—L. H.—July 8, 1931—1½ pp.*)

The City Council has power to appoint an officer to greet distinguished visitors.

Citation:

Statute: SH '29, 24: 65.70.

DAYLIGHT SAVINGS BY ORDINANCE

(No. 6647—*R. N.—April 23, 1930—1½ pp.*)

The City Council has power to fix by ordinance the time at which officers and employees should work and to fix the time of the clocks

under the control of the city. Such an ordinance is not required to be submitted to a vote of the people.

Citation:

Statute: Cities and Villages act, art. V, sec. 1, cl. 71.

Note: See also opinion No. 8905, p. 84.

POWER OVER DISPOSAL OF IMPOUNDED DOGS

(No. 7740—C. J. A.—September 6, 1932—5 pp.)

The City Council has the legal power to pass an ordinance empowering the poundmaster to give impounded and unclaimed dogs to institutions of learning, hospitals and the like, to be used humanely for the benefit of mankind.

Citation:

Statute: SH '31, 38: 144.

Vivisection: An injunction was denied to restrain the city from disposing of impounded dogs for vivisection purposes or without judicial process.—*Koestner v. Chicago*, 278 Ill. App. 624 (1934).

The Circuit Court upheld the right of the city to dispose of dogs to universities and experimental institutions under an ordinance passed in 1931. Suit to restrain enforcement of this ordinance had been brought by the Illinois Anti-Vivisection Society and George D. Patterson. An appeal is pending.

SALE OF LIBERTY LOAN BONDS

(No. 6556—Treasury Department, Federal Reserve Bank—J. W. B.—December 4, 1929—2 pp.)

The City Council has power to authorize the sale of Liberty Loan bonds purchased by the city.

Citation:

Statute: Cities and Villages act, art. 5, sec. 1.

COMPENSATING OWNERS OF DEPRECIATED REAL ESTATE

(No. 8394—L. H.—May 17, 1934—2 pp.)

The City Council has no power to pay public monies to the holders of depreciated private real estate bonds for the losses they have suffered.

CITY IN MILK BUSINESS—MILK TO POOR

(No. 7442—Chairman, Subcommittee Investigating Cost of Retail Milk—C. J. A.—February 8, 1932—7½ pp.)

So long as private companies are able to supply all the milk needed, even though the prices are exorbitant, the city as a governmental

body has no express or implied power to engage in the milk business, in competition with the private companies, except that it may use charitable funds to purchase and distribute milk to those who are destitute.

Citations:

- Cases:** Opinion of Justices, 155 Mass. 601, 30 N. E. 1142 (1892).
In re Municipal Fuel Plants, 182 Mass. 198, 66 N. E. 25 (1903).

ESTABLISHMENT OF PUBLIC DEFENDER

(No. 8611—O. S. F.—January 3, 1935—2 pp.)

The City Council has no power to create the office of Public Defender in the Municipal Court.

Citations:

- Statute:** SH '33, 24: 65.
Cases: Chicago v. Williams, 182 Ill. 135 (1899).
Chicago Coach Co. v. Chicago, 337 Ill. 200 (1930).

REQUIRING UNIFORMS TAILORED BY CHICAGO UNION LABOR

(No. 8738—Chairman, Committee on Judiciary and State Legislation—J. A. S.—April 8, 1935—2 pp.)

A proposed ordinance, which requires that the uniforms of policemen and firemen be tailored in Chicago shops that employ union labor only would be illegal.

Citations:

- Cases:** Marshall and Bruce Co. v. City of Nashville, 109 Tenn. 495 (1902).
People v. Fisk, 188 Ill. 206 (1900-01).
Chicago v. Rumpf, 45 Ill. 90 (1867).
Berry v. Chicago, 320 Ill. 536 (1926).

PRESCRIBING CHARGES FOR TRAFFIC STATISTICS

(No. 7592—Commissioner of Public Works—L. H.—June 2, 1932—2 pp.)

In the absence of statutory authority to gather and disseminate traffic volume studies, the City Council can not prescribe a fee or fix any rate schedules as a charge to those to whom the information is furnished.

Citation:

- Case:** Arms v. Chicago, 314 Ill. 316 (1925).

Poor Relief: By virtue of statute approved March 6, 1936 amending sec. 2a of art. VII and sec. 1 of art. VIII and adding sec. 102 to art. V of the Cities and Villages act, the city is empowered to levy a 3 mill tax for poor relief.—Ill. Laws (2nd sp. sess., 1936).

An ordinance was passed on July 1, 1936, providing for the administration

of relief and support of poor and indigent persons lawfully resident within the city. The office of Commissioner of Relief was created to superintend and care for such relief.—Coun. J. (1936-37), p. 1958.

Local Improvement Fees: The determination by the City Council of fees to be paid real estate experts for a local improvement is a legislative matter and such discretion is not subject to judicial inquiry.—*Tribune Company v. Thompson*, 342 Ill. 503 (1930).

Hospitals: The City Council of any city having a population of 500,000 or more shall have the authority to erect and maintain hospitals within or without the city limits for the segregation and treatment of contagious or communicable disease.—Ill. Laws (1935), p. 370.

The City Council of any city having a population of 500,000 or more shall have the power to establish and maintain maternity or lying-in hospitals and dispensaries.—Ill. Laws (1935), p. 431.

Plant Nursery: The city has implied power to maintain on its property a nursery to supply its parks and public grounds with trees and shrubs and the City Council may exercise such power by resolution, without a formal ordinance.—*People v. Chicago*, 363 Ill. 409 (1936).

(2) Ordinance Making

EXEMPTION FROM ORDINANCE REQUIREMENTS—BUILDING PERMIT EXEMPTIONS

(No. 8372—*President, Board of Health*—A. F. G.—April 25, 1934—2 pp.)

An ordinance cannot be amended, repealed or suspended by an order or a resolution of the City Council.

Where an ordinance requires all persons erecting buildings within the city to take out certain permits, the City Council has no power, by order, to exempt a particular institution from the provisions of such ordinance.

Citations:

Case: *Hibbard and Co. v. Chicago*, 173 Ill. 91 (1898).

Other reference: Opinion No. 7320 (this volume, p. 87).

OPINION OF FOREGOING SYNOPSIS

We have received your letter of April 21, 1934, inquiring as to the course of conduct you are to take in reference to a certain order passed by the City Council February 7, 1934.

The order in question directs you to waive inspection fees and to issue all necessary permits free of charge to the Chicago Policlinic for its building to be erected at No. 117 West Oak street.

You inquire in view of the passage of the above order if you would be justified in issuing free permits to a similar institution, which is building at another address and which has made application to you for similar privileges.

Our answer must be in the negative. You would not even be justified in issuing the free permits to the Chicago Policlinic as directed by the Coun-

cil order for two reasons: First, the law is well settled that an ordinance cannot be amended, repealed or suspended by an order or resolution; second, it is invalid because it discriminates in favor of a particular person. With an ordinance in existence requiring all persons erecting buildings in Chicago to take out certain permits and pay certain fees, the order above referred to amounts to a mere license to this particular institution and is a special privilege granted to one, which by the general ordinance applicable to all of the citizens of Chicago is denied to others.

In the case of *Hibbard & Co. v. City of Chicago*, 173 Ill. 91, an ordinance regulating the manner and kind of awnings erected in Chicago was in force. Permission was granted the Hibbard Company by resolution of the City Council to erect an awning differing from the kind permitted by the general ordinance; in effect granting a special privilege to the firm in question. The court in passing on this question said:

"A municipal corporation cannot confer power upon one person to do an act which is prohibited to another having an equal right to do the same act, and ordinances cannot favor or discriminate against any person or class of persons, but must be uniform and of general operation within the corporate limits."

The two opinion letters from this office dated October 20, 1931 and November 24, 1931, to which you refer are in substantial accord with the views expressed here.

* * * * *

AMENDMENT OF ORDINANCE

(No. 6695—*Commissioner of Public Works*—W. W.—June 12, 1930—2½ pp.)

The City Council has no power to change any ordinance by an order.

To change an ordinance the act of the City Council must be of equal solemnity to the enactment of the ordinance.

Citations:

Ordinance: Code '22: 4128.

Cases: *Chicago and Northern Pacific RR. v. Chicago*, 174 Ill. 439 (1898).
Hibbard v. Chicago, 173 Ill. 91 (1898).
People v. Mount, 186 Ill. 560 (1900).

REPEAL OR AMENDMENT OF ORDINANCE BY ORDER

(No. 7118—*Commissioner of Buildings*—J. F. G.—September 10, 1931—2 pp.)

A City Council ordinance, which is general in its nature, cannot be repealed or amended by a Council order so as to except from its operation a specific case and such order is not binding.

Citations:

Cases: *People v. Thompson*, 209 Ill. App. 507 (1918).
Hope v. City of Alton, 214 Ill. 102 (1905).

Ordinance Amendment: An amendatory ordinance which is complete in itself is not void merely because it purports to amend a void City ordinance, where the ordinance, as amended, is not subject to the same objections which rendered the prior ordinance void.—*Chicago v. McKinley*, 344 Ill. 299 (1931).

EFFECT OF REPEALING ORDINANCE ON AN ORDINANCE

(No. 7016—*Commissioner of Compensation—C. J. A.—July 17, 1931—3½ pp.*)

Where an ordinance granting a railway company certain privileges provides for the repeal of all previous ordinances inconsistent with it, a prior ordinance of a similar nature is no longer valid and need not be renewed.

Citations:

Ordinances: Coun. J. (1910-11), p. 4099.
Id. (1930-31), pp. 3994-4008.

AMENDMENT OR REPEAL OF APPROPRIATION ORDINANCE

(No. 6582—*Chairman, Committee on Finance—L. B. E., E. P. M., J. G. D.—January 9, 1930—3½ pp.*)

The City Council has the power to amend the appropriation ordinance at its next regular meeting occurring not less than five days after the passage of the ordinance, provided the Mayor has not vetoed any of its items. In cases where the Mayor has vetoed items, the City Council's power to amend is confined to them.

The City Council has no power to repeal the appropriation ordinance.

Citations:

Statutes: SH '29, 24: 49, 101.

Other reference: 2 McQuillin, Mun. Corp. (2nd ed.), sec. 871, p. 938.

AMENDMENT OF CONTRACT ORDINANCE

(No. 6543—*Chairman, Committee on Railroad Terminals—R. N. L.—November 18, 1929—4 pp.*)

A contract ordinance vacating a street for the benefit of certain railroads, which is in effect and under which property rights to the street have become vested, cannot be amended by the City Council.

Citations:

Ordinance: Coun. J. (June 26, 1929, p. 674, as amended Nov. 6, 1929, p. 1438).

Case: Gormley v. Day, 114 Ill. 185 (1885).

EFFECT OF REPEALING CLAUSE OF CITY CODE

(No. 6853—*Commissioner of Buildings—W. W.—March 25, 1931—3 pp.*)

The ordinance of June 28, 1915, amending section 237 of the 1911 Code is no longer in force, as it was repealed by the City Code of

1922 through section 4224 which repealed all general ordinances passed before November 22, 1922.

Citations:

Ordinances: Code '11: 237, as amended June 28, 1915.

Code '22: 445, 4224.

Case: Fish v. Walsh, 323 Ill. 361 (1927).

OMISSION OF ORDINANCE FROM CITY CODE—REGULATING HEATING SYSTEMS

*(No. 7336—Commissioner of Buildings—M. H. F.—December 2, 1931—
2½ pp.)*

The inadvertent omission of a valid ordinance from inclusion in the City Code of 1931 was tantamount to a repeal and can only be remedied by a re-enactment of that ordinance by the City Council.

An ordinance regulating the installation of "gravity warm air heating systems" is valid.

Citation:

Case: Chicago v. Wonder Heating and Ventilating Systems, Inc., 345 Ill. 496 (1932).

DATE OF PASSAGE OF ORDINANCES

*(No. 7175—Superintendent of Maps and Ex-Officio Examiner of Sub-
divisions—L. J. D.—October 8, 1931—1½ pp.)*

The clause "60 days after the passage of the ordinance" means sixty days after the approval of the ordinance by the Mayor.

Citation:

Reference: Op. Corp. Counsel (1914-15), p. 314.

(3) *Aldermen***ALDERMAN HOLDING OTHER PUBLIC OFFICE***(No. 6870—Alderman, 33rd Ward—C. J. A.—April 21, 1931—6½ pp.)*

An alderman cannot ordinarily hold any other public office while he is an alderman and the acceptance of another office, during his term, vacates his office of alderman.

A member of the General Assembly, who is elected and sworn in as an alderman, ceases to be a member of the General Assembly.

Citations:

Constitution: Illinois, art. 4, sec. 9.

Statute: SH '29, 24: 179.

Cases: *Fekete v. City of East St. Louis*, 315 Ill. 358 (1925).

People v. Hanifan, 96 Ill. 420 (1880).

People v. Mahoney, 13 Mich. 481 (1865).

State v. Jarrett, 17 Md. 309 (1861).

People v. Hass, 145 Ill. App. 283 (1909).

Dickson v. People, 17 Ill. 191 (1855-56).

Other reference: Cooley, *Constitutional Limitations* (7th ed.), p. 189.

ALDERMAN ASSUMING ANOTHER PUBLIC OFFICE*(No. 7828—Alderman, 9th Ward—L. H.—December 2, 1932—2½ pp.)*

An alderman who assumes office as clerk of the Appellate Court, automatically divests himself of the office of alderman.

Citations:

Statute: SH '31, 24: 179.

Other reference: Op. Corp. Counsel (1914-15), p. 219.

EXTENSION OF TERM OF ALDERMEN*(No. 6876—Chairman, Committee on Judiciary and Special Assessments—L. H.—April 24, 1931—5½ pp.)*

A proposed act extending the term of aldermen to four years is valid because it is authorized by the Charter Amendment to the State Constitution and because it cannot go into effect without a vote of the people of the city.

Citations:

Constitution: Illinois, art. IV, secs. 22, 28, 34.

Case: *Perkins v. Cook County Commissioners*, 271 Ill. 449 (1915-16).

Aldermen: A general election of aldermen is to be held in 1935 and every four years thereafter. The term is to be four years. Referendum approved November 6, 1934.—Ill. Laws (1933) p. 219.

CREATION OF TAG DAYS BY ALDERMEN*(No. 8407—Mayor—M. D. S.—May 25, 1934—2 pp.)*

An alderman has no right to create a tag day in any part of the city.

Tag days are limited by ordinance to three annually and then can be held only on the days that are designated by the City Council.

The so-called "Poppy Day" is limited to one day in May of each year.

D. MAYOR

(1) *Vacancy in Office*

ELECTION TO FILL VACANCY IN OFFICE OF MAYOR

(No. 7969—City Council—J. F. G., L. H., W. H. S.—March 14, 1933—9½ pp.)

There is no provision in the Cities and Villages act for the election or appointment of a mayor *pro tem* or acting mayor when the death of the mayor occurs more than one year before the expiration of his term of office.

Either special legislation should be enacted to provide for the performance of those functions of the Mayor which are essential to the city government, or the City Council should call a special election for Mayor, notify the Board of Election Commissioners of that election and request the board to fix the date of a primary election to be held on the same day of the week seven weeks prior to the special election.

Citations:

- Statutes:** Cities and Villages act, art. 11, secs. 1, 2, 3, 4, 8, 9, 10, 13; art. III, sec. 18; art. VI, sec. 3; art. VII, sec. 11.
 Primary act, sec. 6, 30.
 Special Charter act, Feb. 13 (1863), ch. 3, sec. 4.
- Cases:** Sheridan v. Colvin, 78 Ill. 237 (1875).
 People v. Brown, 83 Ill. 95 (1876).
 Crook v. People, 106 Ill. 237 (1883).
 People v. Hummel, 215 Ill. 71 (1905).
 Biffer v. Chicago, 278 Ill. 562 (1917).
- Other reference:** Op. Corp. Counsel (1872-1897), p. 191.

Note: The legal problem with which this opinion is concerned can no longer arise as the state legislature has passed enabling legislation which will prevent it. See note "Mayoralty Vacancy" on page 99 of this volume.

OPINION OF FOREGOING SYNOPSIS

On March 13, 1933, sixteen members of the City Council issued a call for a special meeting to be held at ten o'clock this morning for the sole and only purpose of receiving a legal opinion from the Corporation Counsel pertaining to the election of a mayor *pro tempore* and for no other purpose whatsoever.

Since the issue of this call we received a communication from Alderman John S. Clark requesting an opinion from this department as to the power

and duty of the City Council in regard to filling the vacancy caused by the death of our late lamented mayor, Anton J. Cermak.

The inquiry from Alderman Clark relates not only to the immediate election or appointment of a mayor *pro tem* or acting mayor but also to the steps necessary for the calling of a special election to fill the existing vacancy.

The specific provisions for filling a vacancy in the office of mayor are found in article II of the Cities and Villages act (Smith-Hurd Illinois Revised Statutes 1931, pp. 337, 338). These provisions are as follows:

"Sec. 2. Whenever a vacancy shall happen in the office of the mayor, when the unexpired term shall be one year or over from the date when the vacancy occurs, it shall be filled by an election, provided that in cities of 500,000 or less inhabitants, the City Council shall elect one of its own number mayor to act as such and possess all the rights and powers of the mayor, until his successor is duly elected and qualified after a special election which shall be had for such purpose within six months after such vacancy occurs.

"Sec. 3. If the vacancy is less than one year, the City Council shall elect one of its number to act as mayor, who shall possess all the rights and powers of the mayor until the next annual election, and until his successor is elected and qualified.

"Sec. 4. During a temporary absence or disability of the mayor, the City Council shall elect one of its number to act as mayor *pro tem*, who, during such absence or disability, shall possess the powers of mayor."

From the foregoing it is clear that during a temporary absence or disability of the mayor provision is made for the election of a member of the City Council to act as mayor *pro tem*. In case of death within one year of the expiration of the term of office of the deceased, the City Council must elect one of its number to act as mayor for the unexpired term. In case of death one year or more before the expiration of the term, the vacancy thereby created must be filled by an election. There is no express provision, however, for the performance of the functions of the chief executive officer of the city during the period intervening between the death of the mayor and the election of a successor if the vacancy occurs one year or more before the expiration of the term, excepting in cities of 500,000 inhabitants or less, in which case it is provided that the City Council shall elect one of its own number to act as mayor until a special election may be held.

A similar situation arose in 1893 upon the death of the then mayor, Carter H. Harrison. The Honorable Adolf Kraus, Corporation Counsel, then rendered an opinion acknowledging that if the power of the City Council to elect a temporary mayor depended solely upon the Cities and Villages act, which provisions applicable to the City of Chicago are now identical with those in force in 1893, "such power clearly does not exist and cannot be exercised." He thereupon invoked a provision in the special charter under which the City of Chicago functioned as a municipal corporation prior to its reorganization under the Cities and Villages act in 1875. That provision read as follows:

"Sec. 4. In case of a vacancy in the office of mayor, or of his being unable to perform the duties of his office, by reason of absence or sickness, the common council shall appoint, by ballot, one of their number to preside over their meetings whose official designation shall be acting mayor. And the alderman so appointed shall be vested with all the powers and perform all the duties of mayor until the mayor shall resume his office, or the vacancy be filled by a new election."

Mr. Kraus was of the opinion that the section of the former charter of the City of Chicago just quoted remained in force by virtue of the saving

clause in section 6, article I of the Cities and Villages act which clause reads as follows:

"But all laws or parts of laws, not inconsistent with the provisions of this act, shall continue in force and applicable to any such city or village, the same as if such change of organization had not taken place."

Mr. Kraus acknowledged considerable doubt as to the correctness of his views upon the subject, and cautioned the Council to confine itself, during the interval until the filling of the vacancy by popular election, to such legislation only as was absolutely urgent and necessary. (See Opinions of the Corporation Council 1872-1897, pp. 191, 192.)

We have studied with great care the special charter of the City of Chicago, the Cities and Villages act, and the pertinent decisions of our Supreme Court. We cannot reconcile the objects and purposes of the reorganization of the City of Chicago under the Cities and Villages act with the position taken by Mr. Kraus in regard to the continuing effect of any provisions in the former charter affecting the election, appointment and qualifications of city officers. The Cities and Villages act purports to provide a complete scheme or plan as a substitute for any special charter provisions regarding the administration of the corporate affairs of the city by creating certain offices, prescribing their functions, their tenure, and the manner in which they shall be filled. (See *Sheridan v. Colvin*, 78 Ill. 237; *People ex rel. v. Brown*, 83 Ill. 95; *Crook v. The People ex rel.*, 106 Ill. 237.)

We are mindful of the fact that our Supreme Court has given effect to certain special charter provisions granting or limiting the powers of cities and their officers (*People ex rel. v. Hummel*, 215 Ill. 71; *Biffer v. City of Chicago*, 278 Ill. 562), but in these cases the general incorporation act contained no provisions specifically covering the *subject matter* involved.

There can be no doubt, however, that the legislature intended to and did provide, by the general act governing cities and villages, for filling a vacancy in the office of mayor whenever one occurs. The difficulty here arises not because of absence of legislative provision to meet the contingency of the death of the mayor but because of the time required to fill the vacancy by popular election.

Section 4 of chapter 3 of the special charter (act of February 13, 1863) by its terms made provision for the appointment by the Council of an acting mayor in any one of three contingencies which might arise, viz.: (1) in case of a vacancy; (2) in case of the absence of the mayor; (3) in case of his sickness. The acting mayor could serve only "until the mayor shall resume his office, or the vacancy be filled by a new election."

It will be noted that in the special charter requirement for the appointment of an acting mayor no distinction is made between the case of a vacancy in the office and the case of absence or temporary disability (sickness) of the mayor. All situations are met alike by the requirement for the appointment of an acting mayor. In the general act for the incorporation of cities and villages there is provision for a mayor *pro tem* in case of the absence of the mayor or in case of his disability, and there is provision for the election by the Council of an acting mayor only in the event of a vacancy of less than one year.

Under the general act incorporating cities and villages the acting mayor is required to serve "until the next annual election, and until his *successor* is elected and qualified." It is thus apparent that the acting mayor provided for in the Cities and Villages act fills a vacancy and succeeds the deceased mayor, if such vacancy is caused by death, whereas the acting mayor designated in the special charter of the City of Chicago corresponds to the mayor *pro tem* in the Cities and Villages act, who possesses the pow-

ers of mayor during a temporary absence or disability of the mayor but who, in no sense, fills a vacancy.

It is clear that the provisions in the general act for the incorporation of cities and villages regarding the election of a member of the City Council to act as mayor or as mayor *pro tem* are not only a substitute for the provision in the special charter for the appointment of an acting mayor but that they are inconsistent therewith and repugnant thereto.

It is our firm conviction that there is no provision in the law now in effect for the election or appointment of a mayor *pro tem* or acting mayor in the present contingency arising from the death of Mayor Cermak, which occurred more than one year prior to the expiration of his term of office.

How, then, may the city function during the time intervening between the call for and consummation of a popular election to fill the vacancy?

Article II of the Cities and Villages act provides that the chief executive officer of a city shall be a mayor (section 1); that he may exercise, within the city limits, the powers conferred upon sheriffs, to suppress disorder and keep the peace (section 8); that he may release any person imprisoned for violation of any city ordinance (section 9); that he shall perform all such duties as are or may be prescribed by law or by the city ordinances, and shall take care that the laws and ordinances are faithfully executed (section 10); that he shall have power, when necessary, to call on every male inhabitant of the city over the age of eighteen years, to aid in enforcing the laws and ordinances, and to call out the militia to aid in suppressing riots, etc. (section 13). Article III relating to the City Council provides that all ordinances passed by the City Council shall, before they take effect, be approved by the mayor, which approval may be indicated by signing the ordinances or by failure to exercise his right of veto (section 18). Article VI relating to officers provides for the appointment of subordinate officers for the city by the mayor with the advice and consent of the City Council (section 3). Article VII relating to finance provides that no money shall be paid by the treasurer except upon warrants signed by the mayor (section 11). These are necessary functions of government and indispensable to the corporate existence of the city which must, in their very nature, have an unquestioned and unquestionable source of authority. Such authority can be clearly and unmistakably given by emergency legislation, and we recommend immediate steps for the introduction and passage of an act by the General Assembly of the State of Illinois to amend the Cities and Villages act so as to provide for the present emergency.

Alderman Clark, in his inquiry, suggests the possibility of an immediate election by the Council of an acting mayor or a mayor *pro tem* with the thought that his acts might be valid as those of a *de facto* mayor or that the legislature might thereafter empower him with sufficient legal authority so that the government might function.

What would be the authority or status of one so elected we do not deem it advisable to answer unless and until such fact occurs. That there would be doubt as to his power to perform the functions vested in the mayor by the provisions of the Cities and Villages act cannot be denied. Since the way is open for the General Assembly to solve the problem in advance of any action by the City Council, it seems futile for us to attempt to decide debatable questions which may never arise.

The procedure necessary to call a special election to fill the vacancy is determined by the requirements of the Cities and Villages act and the Primary Election law. There is no provision which limits the time within which a special election must be called or held from the date that a vacancy occurs. However, sufficient time must be given between the date of calling

and holding the special election to allow at least forty to fifty-five days for the preparation, circulation and filing of petitions for nomination (section 30, Primary law), and a lapse of seven weeks between the date of the primary and the special election (section 6, Primary law).

The Council should call the special election and notify the Board of Election Commissioners thereof with a request that the Board of Election Commissioners fix the date of the primary to be held on the same day of the week seven weeks before the date fixed for the special election, and that the election commissioners publish or post notices of the primary and special election as required by law. The City Clerk should also publish or post notices of the special election as required by the Cities and Villages act.

FILLING VACANT OFFICE OF MAYOR

(No. 8010—*Chairman, Committee on Committees—L. H.—April 10, 1933—3 pp.*)

The City Council may elect a temporary chairman in the absence of the Mayor, but it may do nothing more than that.

An emergency act of the General Assembly has given the City Council power to select a temporary Mayor, clothed with all the powers and duties of a regularly elected Mayor, until his successor is elected and qualified.

Citations:

Statute: Cities and Villages act, sec. 10.

Other reference: Opinion No. 8407 (this volume, p. 95).

SPECIAL LEGISLATION FOR CITIES OVER 500,000 POPULATION—FILLING OFFICE OF MAYOR

(No. 8019—*City Council—J. F. G.—April 17, 1933—3½ pp.*)

The classification of cities by population is constitutional when it bears a reasonable relation to the purpose of the legislation enacted. The fact that Chicago is the only city in the state with a population of 500,000 or over does not make legislation which applies to cities with a population of 500,000 or more special or local in character.

The Graham-Adamowski act, which allows the City Council of all cities of 500,000 or more people to elect a mayor, does not contravene the State Constitution.

Citations:

Constitution: Illinois, art. IV, sec. 22, 34.

Statute: Cities and Villages act, art. II, sec. 2 (as amended, July 1, 1931 and March 31, 1933).

Cases: *Cummings v. Chicago*, 144 Ill. 563 (1891-2-3).

Douglas v. People, 225 Ill. 536 (1907).

Northwestern University v. Wilmette, 230 Ill. 80 (1907).

People v. Grover, 258 Ill. 124, 127 (1913).

Mathews v. Chicago, 342 Ill. 120 (1931).

Mayorality Vacancy: When a vacancy exists in the office of mayor and

the unexpired term is a year or more, it is to be filled by an election. In cities of 500,000 or more inhabitants, the City Council shall elect a mayor from its own membership or not, as the Council shall determine, to act until his successor is elected and qualified. This act takes effect upon passage due to the Chicago emergency.—Ill. Laws (1933) p. 252.

REMUNERATION TO ACTING MAYOR—RIGHTS OF DE FACTO OFFICER

(No. 8049—City Comptroller—L. H.—May 11, 1933—2 pp.)

The Acting Mayor named by the City Council acted in good faith and his authority was generally acquiesced in without contest. He should, therefore, be remunerated as intended by the City Council.

A *de facto* officer whose title is contested would have no right to the emoluments of the office he was holding, if he were ousted.

Citation:

Reference: 41 CJ 1060.

(2) Powers and Duties

DECLARING HOLIDAY FOR CITY EMPLOYEES

(No. 8426—Mayor—L. H.—June 8, 1934—2½ pp.)

While the Mayor is not specifically given power, either by statute or ordinance, to proclaim a holiday for city employees, it is generally understood that the power may be exercised through directions to the heads of departments, who may excuse their employees from duty when there is occasion for it.

An ordinance of the City Council declaring a special holiday for city employees would be construed to include employees of the Chicago Public Library. At the present time, section 663 of the City Code governs the holidays that the employees of the Public Library are to have, unless the Board of Directors of the Library sees fit to give them additional holidays.

Citations:

Statutes: Cities and Villages act, art. V, sec. 1, cl. 71.

Library act, sec. 5.

Ordinance: Code '31: 663.

MAYOR'S POWER TO PERFORM MARRIAGES

(No. 8046—Mayor—L. H.—May 6, 1933—2 pp.)

The Mayor has no authority to perform the marriage ceremony, the power having been withdrawn by statute.

Citation:

Statute: SH '31, 89: 4.

APPROVAL OF QUARTERS OF RETIREMENT BOARD OF ANNUITY AND BENEFIT FUND

(No. 7036—*Commissioner of Public Works—J. F. G.—July 30, 1931—1½ pp.*)

While the Commissioner of Public Works is ordinarily given custody of the City Hall and other buildings, the Mayor must approve the suitability of the office rooms for the Retirement Board of the Policemen's Annuity and Benefit Fund by virtue of the statute creating this fund.

Citation:

Statute: Cah '29, 24: 916.

MAYOR AS TRUSTEE OF MORRISON HOME FOR AGED

(No. 8123—*Mayor—L. H.—July 20, 1933—2 pp.*)

Under the terms of the trust agreement concerning the Morrison Home for the Aged, the Mayor need only fail to reply to the notice asking him to serve in order to allow the trustee to make another appointment in his place.

MAYOR'S REJECTION OF COMMISSION TO TAKE DEPOSITIONS

(No. 7614—*Mayor—L. H.—June 20, 1932—2½ pp.*)

A person, in this case the Mayor, named to act as a commissioner to take depositions of witnesses, for a New Jersey law suit, is not required to serve in such a capacity.

APPOINTMENT AND REMOVAL OF RETIREMENT BOARD OF POLICEMEN'S ANNUITY AND BENEFIT FUND

(No. 8102—*Mayor—G. F. M.—June 24, 1933—1 p.*)

The Mayor has absolute power in the appointment and removal of members of the Retirement Board of the Policemen's Annuity and Benefit Fund. This power may be exercised arbitrarily and no notice need be sent to the City Council.

Citations:

Statute: SH '31, 24: 2.

Case: People v. Hansen, 234 Ill. App. 483.

APPOINTMENTS TO CHICAGO PLAN COMMISSION

(No. 8601—Mayor—J. F. G.—December 26, 1934—2 pp.)

The Mayor has authority to add new members to the Chicago Plan Commission at any time and is not required to appoint any person in place of a member of the commission who has died or resigned.

Citation:

Ordinance: Coun. J. (1909-10), p. 926.

MAYOR'S POWERS AS LIQUOR CONTROL COMMISSIONER

(No. 8354—Mayor—M. H. F.—April 3, 1934—3½ pp.)

The Mayor, as the Local Liquor Control Commissioner, may appoint a deputy or deputies to assist him in his duties as such commissioner. The approval of the City Council is not required for the appointment of deputies to the Local Liquor Control Commissioner.

Citations:

Statutes: III. Laws (Sp. sess. 1933-34), p. 64 (Dramshops act, art. IV, secs. 2, 4, 5).

Ordinance: Coun. J. (1933-34), p. 1542 (Retail liquor dealers' license ord.).

APPOINTMENT BY MAYOR OF CITY HOUSING AUTHORITY

(No. 8420—Mayor—J. F. G.—June 5, 1934—2½ pp.)

A certificate of the State Housing Board which states that there is need for the creation of a Housing Authority in the city, makes it proper for the Mayor, at this time, to appoint the members of the Housing Authority for the city.

Citation:

Statute: III. Laws (Sp. sess. 1933-34), p. 159 (Housing Authorities).

APPOINTMENTS TO CITIZENS' RECREATION COMMITTEE

(No. 8496—Mayor—J. F. G.—August 27, 1934—2 pp.)

The appointment by the Mayor of a non-resident to serve on "The Citizens' Recreation Commission," is proper since this commission was not created by law or ordinance, but was in answer to requests from various citizens.

Citations:

Statutes: Cities and Villages act, art. VI, sec. 6.

III. Laws (1933), p. 159.

Other reference: Coun. J. (1933-34), p. 1836 (Citizens' Recreation Commission).

REVOCATION OF PAWNBROKER'S LICENSE

(No. 8604—C. N.—December 27, 1934—1½ pp.)

The Mayor may not revoke a pawnbroker's license merely upon a citizen's complaint but must base such action upon a report of Commissioner of Police.

Citation:

Ordinance: Code '31: 3552-72.

REVOCATION OF AMUSEMENT LICENSE

(No. 7068—Mayor—J. F. G.—August 11, 1931—1½ pp.)

An amusement license which had been issued without the Mayor's approval may be revoked by the Mayor by a notice to the licensee.

Citation:

Ordinance: Code '31: 1896.

CHANGE OF MAYOR'S PROXY

(No. 7799—City Comptroller—L. H.—November 5, 1932—2½ pp.)

The designation by the Mayor of a new proxy to sign warrants acts as an implied revocation of the first proxy, and the new proxy is the one to sign the remaining warrants.

Citation:

Reference: 2 CJ 528.

SIGNATURE OF DUPLICATE BONDS BY MAYOR'S PROXY

(No. 6797—Deputy Comptroller—S. L. G.—November 7, 1930—3 pp.)

Where the Mayor designates a person as proxy to sign certain bonds and they are stolen, the original authorization permits the signing of a duplicate issue of the bonds by the same person.

Citation:

Statute: SH '29, 24: 30.

SIGNING OF WARRANTS BY MAYOR'S PROXY

(No. 7696—City Comptroller—L. H.—August 6, 1932—4½ pp.)

Where the Mayor delegates his authority to sign certain warrants to a proxy, the proxy may sign these specified warrants when they are lawfully issued, even though legal obstacles delay their issuance for a time.

Citation:

Statute: Ill. Laws (Sp. sess., 1931-32), p. 129.

SIGNING OF WARRANTS BY MAYOR'S PROXY

(No. 7787—*City Comptroller—L. H.—October 20, 1932—3 pp.*)

The addition of a roman numeral indicating the denomination of a warrant is intended as a distinguishing mark to show what amount is contained in the warrant and is not intended to designate a new or different series of warrants.

No new proxy authorization is required from the Mayor for warrants included in the total for which the Mayor has authorized the designated proxy to sign, even though letters have been added to the warrants to distinguish the different denominations.

E. ADMINISTRATIVE OFFICES*(1) Police Department***COMMISSIONER OF POLICE'S RESPONSIBILITY FOR PUBLIC FUNDS**

(No. 6945—*Acting Commissioner of Police—L. H.—June 11, 1931—3 pp.*)

The Commissioner of Police is responsible for public funds collected and handled by employees of his department. To protect himself, he should require that all those employees be bonded.

Citations:

Ordinance: Code '22: 27.

Case: *Chicago v. Southern Surety Co.*, 239 Ill. App. 628 (1925-26).

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of recent date in which you make inquiry as to the proper steps to be taken regarding the bonding of certain employees in your department.

It appears from your said letter that you have received notice from the City Comptroller to the effect that there are certain employees in the Department of Police who collect money belonging to the City of Chicago for licenses, permits, special deposits, etc., and that these employees, who are daily handling city money, should be placed under bond in order to protect the city against loss.

The notice from the Comptroller is justified under section 27 of the Chicago Municipal Code of 1922, which provides that the Comptroller should exercise general supervision over all officers of the city charged in any manner with the receipt, collection or disbursement of the city's revenues. The Comptroller's action, therefore, is calculated not only to protect the city's interests, but is also a protection to the head of the department who is responsible to the city for any shortage or default on the part of an employee, since he has the right to protect himself with a bond. While there is no provision of the statutes specifically naming the head of the Depart-

ment of Police as one who is responsible for the fidelity of his employees, nevertheless, the general rule laid down in the case of *City of Chicago v. Southern Surety Co.*, 239 Ill. App. 628, that a ministerial officer authorized to appoint deputies is responsible for their acts, would apply in case of a loss.

In all cases where the ordinances specifically require that an officer should file an official bond, it is provided that the bond should run directly to the City of Chicago; but in the case of the employee for whom the head of the department is responsible, a different rule prevails, and such bonds should run from the employee and his surety to the head of the department.

Consequently, the proper method for you to pursue is to require the employee in each case to furnish you with an indemnity bond subscribed by a duly accredited surety company running to you as head of the Department of Police, conditioned that the principal and surety jointly and severally obligate themselves to pay over to the City Collector (or to you, if that is your practice) any and all money or other property received by him or coming into his possession which belongs to the City of Chicago or for which said city is responsible, or you as the head of the Department of Police of said city are responsible.

Such indemnity bonds should be submitted to the Comptroller before being accepted, so that if there is any feature of same that is not satisfactory they can be corrected. We also recommend that the bonds be placed in the custody of the Comptroller to be preserved along with other documents of like nature, so that they may be available if and when required.

* * * * *

FIRST DEPUTY COMMISSIONER OF POLICE CIVIL SERVICE STATUS

(No. 8846—Commissioner of Police—Q. O'B.—August 13, 1935—4 pp.)

The First Deputy Commissioner of Police has the same status with regard to civil service as the head of a principal department of the city, whose appointment is subject to confirmation by the City Council.

Citations:

Statutes: Ill. Laws (1935), pp. 287, 560.

APPOINTMENT OF SPECIAL POLICE

(No. 7145—Acting Commissioner of Police—C. J. A.—September 23, 1931—3½ pp.)

Special policemen can be appointed only by the Commissioner of Police and not by a private citizen or a private corporation. Such policemen are under the general supervision and authority of the Commissioner of Police.

If a citizen or a corporation makes a proper showing to the Commissioner of Police that his or its property is in danger and needs to be guarded, and that the regular police force cannot furnish adequate

protection, and asks for the appointment of special policemen and will agree to pay the salary or remuneration of those special policemen, it is the duty of the Commissioner of Police to appoint special policemen to guard the premises specified.

Citation:

Ordinance: Code '31: 3744.

Special Police: Persons appointed under section 1921 of the Code of 1922 as special patrolmen at the instance of private citizens from whom they receive their compensation are not in the regular police service of the city.—*Komorowski v. Boston Store of Chicago*, 263 Ill. App. 88 (1931).

RESTRICTIONS ON APPOINTMENT OF SPECIAL POLICE

(No. 8891—*Commissioner of Police—O. F. W. and W. V. D.—October 4, 1935—1½ pp.*)

The Commissioner of Police may appoint special police to do special duty at any fixed place at the request of private individuals, at their charge and expense, but the place must be definitely and clearly circumscribed.

Citation:

Ordinance: Code '31: 3744.

APPOINTMENT OF SPECIAL POLICE FOR A TRUCK

(No. 8141—*Commissioner of Police—E. L. M.—August 10, 1933—3 pp.*)

The Commissioner of Police has authority to appoint special policemen who have the right to carry arms only in the precise premises which they have been appointed to guard while they are in discharge of their duties at such place.

Citations:

Ordinances: Code '31: 3744, 3749, 3751.

Other references: Op. Corp. Counsel (1915-16), p. 159.

Id. (1920-23), p. 1030.

CITIZENSHIP REQUIREMENTS OF SPECIAL POLICE

(No. 7579—*Commissioner of Police—Jud. G.—May 16, 1932—2½ pp.*)

One who has not received his final naturalization papers cannot be appointed a special policeman.

An alien who declares on oath before the clerk of any court which has powers of naturalization, his intention to become a citizen of the

United States may, not less than two years nor more than seven years after that declaration, file a petition for full naturalization.

Citations:

Constitution: United States, art. XIV, sec. 1.

Ordinance: Code '31: 3743.

Other reference: Bouvier, Law Dictionary (Rawle's 3rd rev.), vol. 1, p. 490, "citizen."

SPECIAL POLICE CARRYING CONCEALED WEAPONS

(No. 8715—*Secretary, Board of Local Improvements—C. N.—March 14, 1935—2 pp.*)

Special policemen of a transport company properly appointed under the city's ordinances are entitled to carry concealed weapons in the same manner as regular police officers.

Citations:

Ordinances: Code '31: 3743-56, 4204.

MUNICIPAL COURT RULES CONCERNING BONDSMEN

(No. 7499—*Commissioner of Police—L. H.—March 16, 1932—4 pp.*)

The Commissioner of Police must observe the rules of the Municipal Court concerning professional bondsmen in the criminal and quasi-criminal cases over which that court has jurisdiction.

The Municipal Court has authority to adopt rules governing the acceptance of bonds in criminal and quasi-criminal cases if it sees fit to so act.

Citations:

Statutes: SH '31, 38: 627c-627h.

Municipal Court act, sec. 20.

Administrative rules: Municipal Court, Rules XIX-XXX.

EFFECT OF INJUNCTION ON POLICE COMMISSIONER

(No. 6711—*Acting Commissioner of Police—F. J. V.—July 9, 1930—1½ pp.*)

The Commissioner of Police is not bound by a writ of an injunction restraining private parties from causing a warrant to be issued since he was not a party to the suit, but because of comity between the court and executive officers, warrants contrary to such writ of injunction should not be executed until the court issuing the writ has been notified, unless the warrant is issued by a court of competent jurisdiction.

WRIT OF HABEAS CORPUS ON POLICE COMMISSIONER

(No. 7335—*Commissioner of Police*—S. A. M.—December 2, 1931—2 pp.)

Where a local judge has issued a writ of habeas corpus, commanding the Commissioner of Police to produce the body of a person whom the commissioner has delivered to the sheriff of another county after being served with a fugitive warrant, the commissioner has no authority to proceed to the other county and take the person into custody for delivery to the local judge. The commissioner should make a proper return to the judge, presenting the facts and stating that the person is not now in his custody.

Citations:

Statutes: SH '29, 38: 219, 654-6.

EXTRADITION, POLICE DEPARTMENT

(No. 8623—*Commissioner of Police*—M. D. S.—January 11, 1935—2 pp.)

There can be no legal interstate rendition of a fugitive without a specific charge of crime made by indictment or by an affidavit in due form. Only then do the authorities of the demanding state acquire jurisdiction to act. The mere issuance of a warrant in the demanding state is not sufficient authority.

Citation:

Reference: Opinion No. 7370 (this volume, p. 108).

POLICE ACTION ON ARREST WARRANT OF ANOTHER STATE

(No. 7370—*Commissioner of Police*—S. A. M.—December 11, 1931—2 pp.)

A warrant for arrest is of no validity beyond the boundaries of the state whose court issues it.

The Commissioner of Police of the city should take no action on the bench warrant of an Indiana court issued for the arrest of a person.

Citations:

Statute: SH '29, 60: 3.

Case: *Carpenter v. Lord*, 171 Pac. 577 (Ore., 1918).

USE OF POLICE AS PROCESS SERVERS

(No. 8721—*Commissioner of Police—W. V. D.—March 16, 1935—1 p.*)

Police officers should not be used to serve notices of court proceedings in other cities on residents of Chicago.

CITY'S INTEREST IN SUIT AGAINST POLICE OFFICERS

(No. 7497—*Mayor—L. H.—March 16, 1932—4 pp.*)

The city, as a municipality, has no interest in a suit brought against a police officer, even though the controversy arises out of acts connected with the performance of duty by the officer.

Citation:

Case: *Chicago v. Williams*, 182 Ill. 135 (1899).

CITY'S LIABILITY IN SUITS AGAINST POLICE

(No. 6954—*Chairman, Committee on Finance—J. W. B. S.—June 15, 1931—1½ pp.*)

The city, not being a party to a suit in which it is defending certain of its police officers, is not liable for any loss or damage arising from the suit.

DIVULGING CONTENT OF POLICE RADIO MESSAGES

(No. 8668—*Commissioner of Police—O. F. W. and W. V. D.—February 9, 1935—2½ pp.*)

The Police Commissioner has the authority to permit others to publish and divulge the contents of the police radio messages which originate within his department, but this authority does not extend to communications sent to him by other authorities for release over the City Police Department radio.

Citations:

Statute: Federal Communications act (1934), sec. 605.

Administrative order: Federal Communications Commission, Jan. 22, 1935.

FINGERPRINTING AND PHOTOGRAPHING PERSONS

(No. 7979—*Commissioner of Police—S. A. M.—March 24, 1933—4 pp.*)

The Police Department has power to take photographs, Bertillion measurements and fingerprints of an arrested person prior to his con-

viction, but this power must be strictly confined to the purposes of preventing escape, facilitating recapture, and furnishing evidence.

Citations:

Statute: State Bureau of Criminal Identification and Investigation act, July 2, 1931, sec. 5.

Cases: Gow v. Bingham, 107 N. Y. S. 1011 (1908).
Mabry v. Kettering, 10 Ark. 551 (1849-50).
State v. Clausmier, 154 Ind. 599 (1899).
Shaffer v. United States, 24 U. S. App., D. C., 417 (1904-05).
Bartletta v. McFeeley, 117 N. J. Eq. 141 (1934).

CREATION OF BUREAU OF CRIMINAL INVESTIGATION

(No. 7408—*Commissioner of Police—E. R. D.—January 8, 1932—2½ pp.*)

There is nothing in the statute creating the Illinois Bureau of Criminal Identification and Investigation to prevent the city from creating its own Police Bureau of Identification and establishing rules and regulations governing it.

The Chicago Bureau of Criminal Identification will destroy all records of a person acquitted of criminal charges at his request and in his presence.

Citations:

Statutes: Cah. '31, 38: 841-847.

TRANSFER OF CRIMINAL RECORDS TO STATE—RECORDS OF ACQUITTED PERSON

(No. 7410—*E. R. D.—January 9, 1932—2 pp.*)

The Chicago Bureau of Identification is not required to send other than copies of photographs, fingerprints and descriptions of all persons convicted of felonies to the State Bureau of Identification.

All records, photographs or fingerprints of a person acquitted of criminal charges will be destroyed at his demand in his presence by the City Bureau of Identification.

Citations:

Statutes: Cah. '31, 38: 851-847.

ISSUANCE OF GUN PERMIT

(No. 8156—*Commissioner of Police—E. L. M.—August 25, 1933—1½ pp.*)

The Commissioner of Police has no power to grant a permit or license to carry concealed firearms or other deadly weapons.

Citation:

Case: *People v. Niemoth*, 322 Ill. 51 (1927).

Guns by Peace Officers: However duly sworn peace officers are not prohibited from carrying concealed firearms.—Code '31: 4204.

DISPOSAL OF CAPTURED GUNS

(No. 6671—*Commissioner of Police—M. H. F.—May 14, 1930—3 pp.*)

The Commissioner of Police may not give captured guns to the Scientific Crime Detection Laboratory for scientific purposes, but he may lend the guns to the laboratory until it is time to comply with the ordinance and throw the guns into the lake.

The Commissioner of Police should obtain a written receipt for the guns, an agreement to return them at the demand of the Police Custodian or the Commissioner, and a bond to save harmless the Police Custodian and the Commissioner in case the guns are not returned.

The ordinance concerning the time that captured guns are to be dumped into the lake is directory rather than mandatory as to the precise time of dumping, but it would be well to obtain an order from the City Council permitting the loan of the guns to the Scientific Crime Detection Laboratory.

Citation:

Ordinance: Code '22: 3098, as amended.

POLICE DEPARTMENT'S USE OF CONFISCATED WEAPONS

(No. 7554—*Commissioner of Police—S. A. M.—April 20, 1932—3 pp.*)

A weapon that has been duly confiscated may be used by the Police Department.

Where certain firearms are ordered confiscated and destroyed by a court, it will be necessary to appear before the court with a petition saying that the Police Department desires to use the weapons and to get the permission of the court to allow them to be so used. Through this means, any conflict that might arise as the result of a violation of the court's order will be prevented.

Citations:

Statutes: SH '31, 38: 152, 155.

Ordinances: Code '31: 4204, 4205, 4207.

Case: *Glennon v. Britton*, 155 Ill. 242 (1895).

APPROVAL OF WATCHMEN'S UNIFORMS

(No. 6573—*Commissioner of Police—L. N. M.—December 27, 1929—4 pp.*)

The Commissioner of Police may properly refuse to approve uniforms worn by "roundsmen" of a protection or watchman service. Such "roundsmen" are not special patrolmen within the meaning of the city's ordinances and are subject to the same police control as private citizens.

Citation:

Ordinance: Code '22: 3109, 3110 (Special patrolmen).

POLICE ASSISTANCE TO FINANCE COMPANY

(No. 8040—*R. M. S.—April 29, 1933—2 pp.*)

The police may assist a finance company to repossess an automobile or truck.

CONFISCATION OF ABANDONED AUTO

(No. 6558—*Commissioner of Police—L. N. M.—December 10, 1929—2 pp.*)

The Police Department may confiscate an automobile abandoned by fugitives from justice.

Citation:

Statute: SH '29, 121: 236a (Motor Vehicle act).

SALE OF AUTOS BY POLICE DEPARTMENT

(No. 7487—*Commissioner of Police—Jud. G.—March 10, 1932—3 pp.*)

Automobiles that are in possession of the Police Department and that have been identified by their owners and claimed, but not taken away by them, cannot, after a lapse of time, be sold at any auction. These cars should be placed in storage and notice of the fact should be given to their owners.

Citation:

Statute: SH '31, 121: 236c-d.

DEDUCTING TOWING CHARGES IN SALE OF AUTO

(No. 8973—*Commissioner of Police—E. J. B.—December 18, 1935—2½ pp.*)

The Commissioner of Police may deduct from the proceeds of the sales of abandoned, lost or stolen motor vehicles at public auctions

reasonable charges for towing them before paying the proceeds into the City Treasury.

Citations:

Statutes: SH '35, 95½: 45, 47.

OWNER'S RIGHTS IN SALE OF STOLEN GOODS

(No. 7417—*Chairman, Committee on Finance—Jud. G.—January 14, 1932—1½ pp.*)

When the Police Custodian sells a stolen motorcycle, which had been recovered by the Police Department, the owner is entitled to the proceeds of the sale less reasonable storage charges for the time the city stored it.

Citation:

Case: Methodist Episcopal Church v. Vicksburg, 50 Miss. 601 (1874).

SUBPOENA OF AUTO THEFT RECORDS

(No. 7104—*Acting Commissioner of Police—E. Broz.—August 31, 1931 2½ pp.*)

Since automobile theft records are memorandum records, not public records, these records and not copies thereof must be produced on a *subpoena duces tecum* issued by a commissioner appointed by a court.

Citations:

Statutes: SH '29, 51: 14, 36.

Other reference: 4 Wigmore, Evidence, sec. 2182.

(2) Health Department

OFFICE OF PRESIDENT OF BOARD OF HEALTH

(No. 8472—*M. D. S.—July 17, 1934—1½ pp.*)

Officials of the type of the President of the Board of Health are considered judicial or quasi-judicial officers, as their power is purely discretionary, and there are no fixed duties or liabilities prescribed by law.

Citations:

Cases: Munsen v. Bartells, 138 Ill. 322 (1891).

Hill v. Board of Aldermen of Charlotte, 72 N. C. 55 (1875).

Other reference: Cooley, Torts, par. 300.

Opinion No. 8469 of July 16, 1934, is in accord with the above opinion.

INDUCTION OF NEW MEMBERS OF BOARD OF HEALTH

(No. 6779—*Commissioner of Health—M. H. F.—September 27, 1930—2 pp.*)

New members of the Board of Health should be sworn in and their oaths of office filed in the City Clerk's office before taking their places on the board.

Citation:

Statute: SH '29, 24: 87.

PUBLIC INSPECTION OF HEALTH DEPARTMENT RECORDS

(No. 7833—*C. J. A.—December 13, 1932—4 pp.*)

Health Department records are public records but this does not give any taxpayer the right to inspect the same at will; he is only entitled to do so as a matter of right if he can show some personal rights in the particular records he desires to examine, subject to any reasonable rules as to time and manner of such inspections as the department may prescribe.

Citations:

Cases: King v. Lucas, 10 East 235 (1808).

Scribner v. Chase, 27 Ill. App. 36 (1888).

Chicago Title and Trust Co. v. Danforth, 137 Ill. App. 357 (1908).

Other references: Op. Corp. Counsel (1920-23), p. 686.

Id. (1924-25), p. 224.

Opinion Nos. 6901, 7604 (this volume, pp. 114, 115).

INSPECTION OF VITAL STATISTICS RECORDS

(No. 6901—*Commissioner of Health—C. J. A.—May 13, 1931—2½ pp.*)

Birth and death records of the Health Department should be open to the public for legitimate purposes but the Health Department need not extend the courtesy of its records to mere idle curiosity seekers.

Citations:

Reference: Op. Corp. Counsel (1924-25), p. 227.

REGISTRAR OF VITAL STATISTICS—CERTIFICATION OF BIRTHS AND DEATHS

(No. 8353—*Board of Health—A. F. G.—April 2, 1934—3 pp.*)

The City Health Department is the local registrar of vital statistics.

No seal is required on certified copies of birth, stillbirths and deaths

issued by the Health Department, but the fact that the department has no seal should be so stated on each certificate.

Citations:

Statutes: SH '33, 111½: 39, 55.

Id., 51: 16.

Ordinances: Code '31: 2178-81.

Other references: 22 CJ 977.

FURNISHING VITAL STATISTICS TO COUNTY CLERK

(No. 6937—*Commissioner of Health—M. H. F.—June 5, 1931—2½ pp.*)

The City's Registrar of Vital Statistics must furnish records of births, stillbirths and deaths to the County Clerk.

Citations:

Statutes: SH '29, 111½: 36-57.

Case: People v. Heckard, 341 Ill. 144 (1931).

BIRTH CERTIFICATE IN ADOPTION CASES

(No. 7430—*President, Board of Health—Jud. G.—January 25, 1932—5½ pp.*)

The proper place to register a certificate of birth originating in a decree of adoption is with the City's Department of Health. The department should make a record of the decree of adoption and forward it to the State Board of Health as in all other cases of birth registrations.

Citation:

Statute: Registration of Births act (1915), secs. 3, 4, 12, 13a, 20 (as amended July 3, 1931).

FURNISHING DEATH LIST TO NEWSPAPERS

(No. 7604—*President, Board of Health—C. J. A.—June 13, 1932—2½ pp.*)

The Department of Health may furnish to a newspaper a daily list of the names and addresses of all persons who have died within the city. This privilege may be withdrawn at any time should it be abused.

Citations:

References: Op. Corp. Counsel (1924-25), p. 224.

Opinion No. 6901 (this volume, p. 114).

COMMISSIONER OF HEALTH'S ABATEMENT OF NUISANCES.

(No. 6990—*Commissioner of Health*—L. J. D.—July 6, 1931—1½ pp.)

The Commissioner of Health has power to abate a nuisance, whether or not the owner of the property on which the nuisance exists is a resident of the city.

Citation:

Ordinance: Code '22: 2199.

HEALTH DEPARTMENT'S CERTIFICATION OF COPIES OF RECORDS

(No. 7582—*President, Board of Health*—C. J. A.—May 20, 1932—4½ pp.)

No specific provision is made either by statute or by ordinance as to how the Health Department or the other departments of the city's government should certify copies of records. Copies of records may be certified in any reasonable manner customarily used for certification.

The reference to the use of a seal in "An Act to revise the law in relation to the Secretary of State" approved March 30, 1874, applies only to the manner in which the Secretary of State may furnish certified copies of records from his office and has no application to the City's health department.

If the Health Department should desire to adopt its own distinctive seal, it would not be in any violation of any statute or ordinance but that adoption would not have special legal effect or significance unless authorized by the City Council.

The authentication of a certified copy of record usually requires the imprint of a seal.

Citations:

Statutes: SH '31, 111½: 39, 55.

Cah. '31, 124: 7.

Ordinances: Code '31: 256, 691, 693.

(3) *Public Works Department*

SUPERVISION OF PUBLIC GROUNDS—PERMITS FOR ERECTION ON PUBLIC GROUNDS

(No. 6662—*Commissioner of Public Works*—R. N. L.—May 5, 1930—3 pp.)

The Commissioner of Public Works is charged with the superintendence and regulation of all the public grounds of the city, and no

person, firm, or corporation may erect a temporary structure on city property without a permit from him.

The Commissioner of Public Works may not issue a permit for the erection of a permanent structure on public grounds without the consent of the City Council.

Citations:

Ordinances: Code '22: 3212, 3221.

OPINION OF FOREGOING SYNOPSIS

Your letter of recent date requesting an opinion as to what action should be taken by you in regard to the application for a permit for the use of the water fund property lying east of the Chicago avenue pumping station, has been referred to me for reply.

We beg to advise you that section 3212 of the Chicago Municipal Code of 1922 provides, in part, that it shall be the duty of the Commissioner of Public Works, subject to the provisions thereof and the ordinances of the city, to take special charge and superintendence of all streets, alleys and highways in the city, and of all walks and cross-walks, bridges and docks, wharves and public places and public grounds in said city. We also beg to inform you that section 3221 of the Chicago Municipal Code of 1922 provides that in all cases where provision is made by ordinance that the consent of the Commissioner of Public Works shall be obtained to authorize an act to be done, he may grant a permit therefor, subject to restrictions of the ordinances in relation thereto.

You are charged by law with the superintendence, management, control and regulation of all the public grounds of the city, and where a person, firm or corporation desires to erect temporary structures on any city property they are prohibited from doing so unless they make application to you, as Commissioner of Public Works and as custodian of such property, for a permit to do so.

You have no power to issue any permit for the erection of permanent structures without the consent of the City Council.

* * * * *

APPOINTMENT OF WATCHMEN

*(No. 6408—Commissioner of Public Works—J. W. B.—April 17, 1929
—2 pp.)*

The Commissioner of Public Works, as custodian of all city property, has power to employ as many watchmen as he deems necessary to safeguard properly the old Criminal Court building and old County Jail which have been recently transferred to the city by the county.

PAYMENT OF DISPUTED CLAIMS

(No. 6499—*Commissioner of Public Works—J. W. B.—August 29, 1929—3½ pp.*)

The City Council may compromise disputed claims and the Commissioner of Public Works assumes no personal liability when he approves the voucher to pay out the amount named in the compromise.

Citations:

Case: *Agnew v. Brall*, 124 Ill. 315 (1888).

Other reference: *McQuillin*, Mun. Corp., ch. 48, sec. 2643.

**APPROVAL OF VOUCHERS—ACCOUNT CHARGEABLE
FOR VOUCHERS**

(No. 8963—*Commissioner of Public Works—J. F. G.—December 10, 1935—2 pp.*)

If a Council order is passed authorizing the Commissioner of Public Works to enter into a contract or if he otherwise legally obligates the city, his duty is to approve a voucher for the payment of the obligation, or to initiate such a voucher, and the City Comptroller and the City Treasurer are under a duty to pass such vouchers for payment.

Only in cases where there are several appropriations for a department out of which a particular obligation may be discharged and one is preferred, should the Council order the City Comptroller and the City Treasurer to charge vouchers for the payment of the obligation against a particular appropriation account.

**COMMISSIONER OF PUBLIC WORKS' SUSPENSION OF
SUBORDINATE**

(No. 6631—*Commissioner of Public Works—J. W. B.—April 3, 1930—1 p.*)

The Commissioner of Public Works may suspend any subordinate in his department for a reasonable period of not more than thirty days whenever in his judgment the subordinate has been guilty of conduct unbecoming to a civil service employee, or has in any manner violated the rules of the department or the Civil Service act.

Citation:

Statute: Civil Service act, sec. 12.

PERMIT FOR NAVY PIER WHARFING PRIVILEGES

(No. 7770—*Commissioner of Public Works—L. H.—October 11, 1932—1½ pp.*)

The Commissioner of Public Work's authority to issue permits for wharfing privileges along the recreation section of Navy Pier does not give him power to grant exclusive privileges. He should regulate the exercise of the wharfing privileges in a reasonable manner according to his discretion.

Citation:

Ordinance: Coun. J. (1932-33), p. 2813.

REMOVAL OF SIGN FOR ORDINANCE VIOLATION

(No. 6704—*Commissioner of Public Works—R. N. L.—July 3, 1930—9½ pp.*)

The Commissioner of Public Works has the power to remove an electric sign which had not been removed by the owner pursuant to an order of the Commissioner of Gas and Electricity that such sign be removed for a violation of pertinent ordinances, such as the failure to pay the annual fee or a failure to keep the sign in repair.

Citations:

Ordinances: Code '22: 1642-48, 3699, 3710.

Coun. J. (1924-25), p. 4693.

REMOVAL OF GASOLINE PUMPS AND TANKS ON STREETS

(No. 6919—*Division Marshal in Charge of Fire Prevention—C. J. A.—May 28, 1931—2½ pp.*)

The Division Marshal in charge of fire prevention has no authority to remove gasoline pumps and tanks unlawfully installed on public streets, but such authority is vested in the Commissioner of Public Works.

Citations:

Ordinances: Code '22: 2279 (d) as amended, 2374, 3215, 3699, 3709-11.

ENTRY OF PUBLIC WORKS EMPLOYEES TO BUILDINGS

(No. 8756—*M. D. S.—April 27, 1935—2 pp.*)

Property owners are required to permit the entry of employees of the Department of Public Works into their buildings whenever necessary or advisable.

Citations:

Ordinances: Code '31: 4094, 4107.

REMOVAL OF EVICTED PROPERTY FROM STREETS

(No. 6806—*Commissioner of Public Works—C. J. A.—November 26, 1930—2 pp.*)

Where a bailiff has placed personal property in the street while executing a writ, the Department of Public Works should not remove it at public expense, but at the expense of the owner, if he fails to remove it himself.

HANDLING GARBAGE DISPOSAL COMPLAINTS

(No. 7073—*Commissioner of Health—L. H.—August 13, 1931—2 pp.*)

While complaints on the disposition of garbage, ashes and waste may properly be handled by the Health Department, they may also be handled by the Department of Public Works.

Citation:

Ordinance: Code '31: 161.

Bureau of Central Purchasing: The Bureau of Central Purchasing was established in the Department of Public Works. The Commissioner of Public Works has the authority and is under a duty to purchase or contract for all supplies, equipment and contractual services needed by all departments, boards and officers.—Coun. J. (1932-33), p. 2411.

Bureau of Compensation: A Bureau of Compensation was established in the Department of Public Works and the former Department of Compensation was abolished. The new bureau has jurisdiction in determining the rates of compensation where privileges are granted in streets and public places.—Coun. J. (1932-33), p. 2690.

(4) *City Comptroller*

RESIGNATION OF COMPTROLLER—POWERS OF DEPUTY COMPTROLLER

(No. 6827—*Deputy City Comptroller—E. C. H. and C. J. A.—January 16, 1931—2 pp.*)

When the resignation of a person from the office of City Comptroller has not been accepted, nor his successor duly appointed, that person is still responsible for the office.

The Deputy City Comptroller has the authority to exercise the powers and duties of the City Comptroller, when the latter is absent from office; in this situation, the city warrants bearing the facsimile signatures of the Mayor and City Comptroller should be signed by the Deputy Comptroller as Deputy Comptroller.

Citation:

Ordinance: Code '22: 53.

PRINTING OF ANNUAL REPORT

(No. 6567—City Comptroller—L. H.—December 13, 1929—2 pp.)

The City Comptroller may proceed with the printing of his annual report even though it is impossible to record the resources supporting the various funds which are derived from taxation, because the county officials have failed to extend the 1928 taxes.

The amounts contained in the tax levy ordinance should not be treated as actual resources when the amount to be extended is uncertain.

Citation:

Ordinance: Code '22: 42.

EFFECT OF FILING SUIT ON ISSUANCE OF WARRANTS

(No. 6863—Acting Comptroller—C. J. A.—April 11, 1931—3 pp.)

Neither the filing of a suit for an injunction nor notice by an attorney of his intention to sue, suspends the authority of the Comptroller to proceed to issue warrants provided for in the appropriation bill passed by the City Council.

A ministerial officer who, in good faith, proceeds in accordance with a legislative enactment will be protected even though the statute or ordinance should be afterwards declared invalid.

Citations:

Statute: SH '29, 102: 18.

Case: Fergus v. Brady, 277 Ill. 272 (1917).

HONORING CLAIMS AGAINST CITY DEBTS

(No. 8001—Jud. G.—April 6, 1933—2 pp.)

The City Comptroller is not required to honor the claim by one person to money payable to another.

Citation:

Case: Merwin v. Chicago, 45 Ill. 135 (1867).

WITHHOLDING PAYMENT ON CHECKS

(No. 6820—City Comptroller—A. I. B.—December 24, 1930—1½ pp.)

The Comptroller will not be justified in withholding checks due a person upon being informed of the latter's debt to another unless the Comptroller is served with process in the matter from some court or a mechanic's lien has grown out of the dealing.

LIEN CLAIMS AGAINST CITY DEBTS

(No. 8481—City Comptroller—C. N.—July 27, 1934—2 pp.)

The City Comptroller is not required to recognize a lien which a creditor alleges to have upon funds owing to its debtor from the city for services rendered.

Citations:

Cases: Millison v. Fisk, 43 Ill. 112, 118 (1867).
Merwin v. Chicago, 45 Ill. 135 (1867).

ATTORNEY'S LIENS AGAINST CITY DEBTS—ASSIGNMENT OF CLAIMS AND JUDGMENTS

(No. 8148—Comptroller—M. H. F.—August 19, 1933—3½ pp.)

The city is in the same position as a private corporation with relation to the assignment of judgments or claims and it must take cognizance of an attorney's lien filed against the city on a claim owed to the client.

Citations:

Statute: SH '33, 13: 14.

Other references: Op. Corp. Counsel (1924-25), p. 648.
17 Op. Corp. Counsel, p. 433.

COMPTROLLER'S POWER TO STOP PAYMENT ON PAYCHECKS

(No. 6871—Acting City Comptroller—L. H.—April 22, 1931—3½ pp.)

Since the law of negotiable instruments applies to pay checks of the city, the Comptroller, as drawer of the check, has the right to order a stoppage of the payment thereon even though the request of the payee does not compel him to do so because the payee stands in the position of an indorser on a bill of exchange.

Citations:

Case: Deinkall v. Movius State Bank, 95 Am. St. Rep. 693, 57 L. R. A. 341 (1915).

Other reference: 7 CJ 701.

RETURN OF CANCELLED PAYCHECK CASHED WITH COUNTERFEIT MONEY

(No. 8151—Comptroller—M. H. F.—August 21, 1933—3 pp.)

When a city employee has received counterfeit money for his paycheck, the Comptroller should not return the cancelled check to the City Treasurer in order that it may be returned to the bank and a cashier's check issued in its stead, as the controversy is between the employee and the party who cashed the check.

COMPTROLLER'S PAYMENT OF VOUCHERS—APPROVAL OF VOUCHERS

(No. 8183—City Comptroller—L. H.—October 4, 1933—3 pp.)

The Comptroller may withhold payment of a voucher if he has reason to believe that such payment would constitute a duplication, an overcharge or a fraud against the city.

The head of a department or office is responsible for the proper approval and vouchering of bills drawn against the appropriations to his department or office and when a bill properly approved and accompanied by a voucher is presented to the Comptroller, his sole responsibility is to see that the bill is proper on its face.

COMPTROLLER'S AUTHORITY TO WITHDRAW WATER CERTIFICATES

(No. 6584—City Comptroller—L. H.—January 13, 1930—2 pp.)

The mark of a literate person, who is temporarily incapacitated from writing, duly witnessed is sufficient authority for the City Comptroller to withdraw water certificates from registration and to make them payable to the bearer.

COMPTROLLER'S RELEASE OF SECURITIES

(No. 8447—City Comptroller—J. F. G.—June 27, 1934—1½ pp.)

The Comptroller has no authority to release collateral held by a trust company in accordance with the terms of a trust deed securing certain notes issued by a corporation, some of which notes are held by the city as security for the payment of an indebtedness to the city.

Bureau of License: The Bureau of License was established under the jurisdiction of the City Comptroller and the Department of License was abolished. Such bureau shall enforce all license ordinances.—Coun. J. (1933-34), p. 1669.

(5) City Treasurer

CITY TREASURER'S WITHDRAWAL OF FUNDS

(No. 8899—City Comptroller—J. F. G.—October 21, 1935—3½ pp.)

The City Treasurer may not withdraw any money which may come into his hands as City Treasurer except by a warrant signed and countersigned as provided by law.

It is the duty of the City Comptroller to exercise general super-

vision over all of the officers of the city who are in any way charged with the receipt, collection, or disbursement of corporation revenues, and the City Comptroller may demand that the City Treasurer or his surety make good any amount of money unlawfully withdrawn by the City Treasurer from the city treasury.

Citations:

Statutes: ISBS '35, 24: 102.

Ill. Laws (1935), p. 1010, sec. 9 (Act in Relation to Funds or Monies Received by Public Officers).

Cities and Villages act, art. VI, sec. 4; art. VII, sec. 11, 17, 18.

Ordinance: Code '31: 72.

OPINION OF FOREGOING SYNOPSIS

Reference is made to your letter requesting advice as to the duty of the City Comptroller in regard to the action of the City Treasurer to reimburse himself from funds in his hands as City Treasurer for the difference between salary checks or warrants issued to him during the years 1931 to 1934, inclusive, in accordance with the annual appropriation bill and the salary of the City Treasurer at the rate of \$10,000 per annum fixed by the City Council for the City Treasurer at the time of the election to that office.*

Section 11 of article VII of the Cities and Villages act (Ill. State Bar Stats. 1935, chap. 24, par. 102), provides:

"All warrants drawn upon the treasurer must be signed by the Mayor and countersigned by the clerk, stating the particular fund or appropriation to which the same is chargeable, and the person to whom payable; and no money shall be otherwise paid than upon such warrants so drawn, except as hereinafter provided."

The City Treasurer had no right, power or authority to withdraw any money which came into his hands as City Treasurer except by warrant signed and countersigned as provided by the section of the statute above quoted. The fact that he, personally, may have had a lawful claim upon the city for the payment of his salary at the rate of \$10,000 per annum gave him no right to take the law into his own hands and withdraw from the city treasury any money to satisfy his personal claim.

The 59th General Assembly of the State of Illinois passed an act entitled "An act in relation to funds or monies received by public officers or agents of public or municipal bodies, by virtue of their offices or positions," which was approved July 8, 1935. Section 9 of that act provides as follows:

"All ex-officers or ex-agents of public or municipal bodies of this state, within one month after this act is in force, who have not already accounted for and paid over or delivered to the treasurer funds, monies, or other things of value, received by virtue of their offices or positions, shall report and pay over or deliver the same as in this act is required by officers and agents, and under like penalties. All officers or agents, or ex-officers or ex-agents, and their sureties shall be relieved from all further responsibility in relation to all funds, monies, or other things of value, reported and paid over or delivered under the provisions of this act."

Section 6 of the same act fixes the penalties for its violation as follows:

"The violation of any provision of this act is hereby declared a misdemeanor, and is punishable by a fine not less than ten dollars (\$10.00)

*This difference was due to salary deductions ordered, as an economy measure by the appropriation ordinance.

or more than five hundred dollars (\$500.00), where the violation is neither intentional nor habitual. If the violation is intentional or habitual, it is hereby made a felony, punishable by confinement in the penitentiary not exceeding five years, or by fine not exceeding ten thousand dollars (\$10,000), or both such fine and imprisonment."

At the time the City Treasurer qualified for the office of City Treasurer, he filed an official bond, which was approved by the City Council, payable to the city and conditioned among other things for the payment of all monies received by him according to law and the ordinances of the city. That bond is in your custody as City Comptroller (sec. 4, art. VI, Cities and Villages act). As City Comptroller it is your duty to exercise general supervision over all of the officers of the corporation charged in any manner with the receipt, collection or disbursement of corporation revenues (sec. 17, art. VII, Cities and Villages act) and to perform such other duties as may be provided by ordinance (id. sec. 18).

Section 72 of the Revised Chicago Code of 1931, as amended, provides that the Comptroller shall make a quarterly audit of the accounts and records of the city treasury verifying the city's cash and securities in the hands of the City Treasurer.

While there is no specific direction in the statutes or ordinances as to the duties of the City Comptroller in the circumstances of this case, it is our opinion that there is an implied duty imposed upon every officer of the city to guard and protect the city's interest in respect of any matter under his supervision.

The City Comptroller may make demand upon the City Treasurer and his surety to make good the amount unlawfully withdrawn from the city treasury and, in case of default, transmit the claim to the law department for further action.

* * * * *

TREASURER AS CUSTODIAN OF CITY FUNDS AND WATER FUNDS

(No. 7587—Commissioner of Public Works—C. J. A.—May 25, 1932—2½ pp.)

The provisions of the statutes and ordinances manifest a clear purpose to make the City Treasurer the custodian of the funds of the Bureau of Water as well as of all other activities of the city.

The establishment of a fund in the name of any official other than the City Treasurer, which would take city funds from the custody of the City Treasurer, is of doubtful validity.

Citations:

Statutes: SH '31, 24: 105, 106, 442.

Ordinance: Code '31: 187.

TREASURER'S CONTROL OF RECEIPTS

(No. 8903—City Collector—E. L. M.—October 25, 1935—2½ pp.)

The City Council can, by ordinance, require receipts and the report thereon be delivered to the City Treasurer daily instead of monthly or at lesser intervals of time.

Citation:

Statute: Ill. Laws (1935), p. 1010, sec. 9 (Act In Relation to Funds or Monies Received by Public Officials).

TREASURER'S HANDLING OF SCHOOL FUNDS—DEPOSITARY BIDS

(No. 6803—City Comptroller—E. C. H. and C. J. A.—November 20, 1930—6½ pp.)

In the exercise of his powers with reference to "school funds," the City Treasurer is, in a legal sense, a different official than when he is dealing with "city funds."

In depositing "city funds" and "school funds," separate bids must be obtained from the banks as to the rate of interest to be paid upon these deposits, and separate bonds should be given by banks to the City Treasurer, as such, in relation to "city funds" and to the City Treasurer, as ex-officio school treasurer, in relation to "school funds."

Citations:

Statutes: Cah. '29, 122: 128-139 (Otis act, sec. 135).

Case: Chicago v. Board of Education, 246 Ill. App. 405 (1927).

TREASURER'S HANDLING OF PENSION FUNDS*

(No. 7382—City Treasurer—G. F. M.—December 14, 1931—3 pp.)

It is the duty of the City Treasurer to safeguard and handle securities and properties entrusted to him by the Policemen's, Firemen's, and Municipal Employees' Annuity and Benefit Funds so as to prevent any loss to those funds, under the penalty of being liable therefor personally on his bond.

Beyond paying for the surety bond of the City Treasurer for each fund, there is no liability attaching to the retirement boards of the various funds to meet the costs of custodianship of securities and properties of the funds.

Citations:

Statutes: SH '31, 24: 951, 1006, 1050, 1106.

Ill. Laws (1931), p. 242 (Firemen's Annuity and Benefit Fund act, sec. 7, 63).

*See pp. 231, 232 for a full reproduction of this opinion.

(6) Law Department

Corporation Counsel: The Corporation Counsel is the legal adviser of the City Council and officers, boards and departments of the city. He is to appear and protect the rights of the city in all actions by or against it or any city officer, board or department, including actions for damages when brought against the officer in his official capacity. But when an officer is sued personally, even if the cause of action arose out of his official duties, the Corporation Counsel can defend only when directed by the City Council.—Ill Laws (1929), p. 209.

CORPORATION COUNSEL'S CONTROL OF CITY'S LAW BUSINESS

(No. 6601—*Chairman, Subcommittee on Local Transportation*—S. A. E.—February 13, 1930—4 pp.)

The Corporation Counsel has the exclusive right to handle and control the law business of the city and it is his exclusive function to appoint and authorize an attorney to perform legal services in behalf of the city or any of its municipal agencies.

Citations:

Ordinance: Code '22: 108.

Case: People v. Faherty, 306 Ill. 119 (1923).

CORPORATION COUNSEL'S DEFENSE OF CITY EMPLOYEES

(No. 8768—*City Council*—J. F. G.—May 15, 1935—1½ pp.)

The Corporation Counsel, when permitted or ordered so to do by the City Council, may defend actions against city employees who are sued personally, if the cause of action arises out of their official duties.

Citation:

Ordinance: Code '31: 35.

Opinion No. 8583 of December 10, 1934 to the Mayor and City Council is in accord with the above opinion.

ACTION IN BEHALF OF UTILITY CONSUMERS

(No. 8869—*J. J. D.*—September 9, 1935—1 p.)

The Corporation Counsel is the legal representative of the city and under proper conditions may appear before the Illinois Commerce Commission in behalf of the citizens of the city.

The city has no authority to make any arrangement with any person which would bind the customers of a public utility.

Citation:

Statute: ISBS '35, 111a: 91.

CORPORATION COUNSEL'S POWER OVER POLICE— GAMBLING

(No. 7355—C. J. A.—December 8, 1931—2½ pp.)

The Corporation Counsel has no authority to direct the Police Department as to how it shall perform its duties; he can only advise the Commissioner of Police as to his opinion on legal matters.

A game which appeals to the competitive spirit of players and which has no feature of reward or premium connected with it, does not constitute a gambling device and is free from prosecution so long as no actual gambling is carried on in connection with it.

CORPORATION COUNSEL'S PROMISE TO REIMBURSE JUDGMENTS

(No. 7733—City Comptroller—L. H.—August 25, 1932—2½ pp.)

Where a private corporation agrees to allow suit to be instituted against it, in this case for the taxes on gasoline sold tax free to the city, on the promise of the Corporation Counsel that the city would reimburse it for any judgment rendered against it, this agreement constitutes a binding obligation of the city and the city is liable to reimburse the company for the judgment and any accrued interest thereon.

Citation:

Case: McGovern v. Chicago 281 Ill. 264 (1918).

LAW DEPARTMENT'S SETTLEMENT OF CLAIMS

(No. 7354—C. J. A.—December 8, 1931—2 pp.)

The City Law Department cannot settle any claims against the city except with the express authority of the City Council. The claimant should have his alderman present his claim to the City Council.

A claim arising through the fault of the West Park Commissioners should be made against the state, and not against the commissioners as such.

Citations:

Cases: Stein v. West Chicago Park Commissioners, 247 Ill. App. 479 (1927-28).

Backer v. West Chicago Park Commissioners, 66 Ill. App. 507 (1895-96).

Wilcox v. People, 90 Ill. 186 (1878).

West Chicago Park Commissioners v. Chicago, 152 Ill. 392 (1894).

Expenditures for Traction Purposes: The city may pay out of the appropriation for the office of the Corporation Counsel for legal services rendered by attorneys whom the Corporation Counsel had appointed as assistants to act as counsel for a citizen's traction settlement committee in drafting proposed traction bills introduced before the legislature and procuring the passage of the bills.—Baltzer v. Chicago, 260 Ill. App. 384 (1931).

*(7) Other City Offices***BOARD OF EXAMINERS OF STATIONARY ENGINEERS RULES
—TERM OF PRESIDENT—ACTION OF BOARD**

*(No. 7712—Board of Examiners of Stationary Engineers—L. H.—
August 12, 1932—3½ pp.)*

The Board of Examiners of Stationary Engineers may determine its own rules of organization and hence may decide as to the term of office of its president.

Any action of the Board of Examiners of Stationary Engineers may be taken by a majority of the board, but the authority delegated to them must be exercised either according to fixed rules previously adopted or in such a reasonable manner as to evidence good faith, fair dealing and good judgment.

Citations:

Ordinances: Code '31: 562-567, 3757-58.

CITY CLERK'S AUTHORIZING USE OF CORPORATE SEAL

(No. 8108—City Clerk—C. N.—July 10, 1933—3 pp.)

The City Clerk possesses no power to authorize the use of the corporate seal of the city by persons having permission to advertise A Century of Progress Exposition. That authorization, if at all possible, would at least have to be in the form of a special order of the City Council.

Citations:

Ordinances: Code '31: 691, 702, 703.

Cases: Storm v. United States, 94 U. S. 76 (1876).
Montgomery County v. Auchley, 103 Mo. 492 (1890).
Gillman v. School District, 18 N. H. 215 (1846).

Other reference: 2 Blackstone's Commentaries, 446.

USE OF CITY SEAL BY PRIVATE INDIVIDUALS

(No. 7904—A. F. G.—January 17, 1933—2 pp.)

The city seal may not be used on songs to be published by a private individual. However, the municipal device may be used for such purposes.

Citations:

Statutes: Cah. '31, 38: 270.

Ordinances: Code '31, 10: 696.

CITY CLERK'S POWER OVER OFFICIAL BONDS

(No. 7132—*City Clerk*—*M. H. F.*—*September 17, 1931*—2 pp.)

When a new official bond has been authorized and accepted as a substitute for and in lieu of the previously executed bonds by the City Clerk under the authority of the City Council, the City Clerk is authorized to return the former bonds without further authority from the City Council.

Citation:

Ordinance: Coun. J. (1931-32, p. 3761.

CITY COLLECTOR'S PUBLICATION OF NOTICE OF APPLICATIONS FOR LIQUOR LICENSE

(No. 8346—*City Collector*—*M. H. F.*—*March 29, 1934*—2 pp.)

The City Collector in complying with the code as to the matter of publishing notices of applications for licenses as city retailers of alcoholic liquor, should make requisition for the advertising of these applications upon the Bureau of Central Purchasing. The data that he submits should not designate any particular daily newspaper.

Citations:

Ordinances: Coun. J. (1932-33), p. 2411.

Id. (1933-34), p. 1542 (Retail liquor license ord., sec. 3143M).
Code '31: 680-690.

CITY COLLECTOR'S ISSUANCE OF VEHICLE LICENSE STICKERS

(No. 7057—*Adjutant General, Sixth Corps Area*—*M. H. F.*—*August 5, 1931*—2 pp.)

In the absence of specific Council authority, the City Collector has no authority to issue vehicle license sticker emblems gratuitously or to part with such emblems without first receiving the prescribed license fee.

Office of City Sealer: The official title of the City Sealer is the Inspector of Weights and Measures.

CITY SEALER'S INVESTIGATION OF ALCOHOLIC CONTENT OF BEER

(No. 8047—*City Sealer*—*Jud. G.*—*May 6, 1933*—2 pp.)

There is no ordinance which requires the City Sealer to ascertain whether beer sold in the city contains the proper alcoholic content. However, there is nothing to prevent the City Sealer from making investigations of the alcoholic content of beer and reporting his findings to the federal authorities.

Citations:

Ordinances: Code '31: 528-530, 552.

POWER OF CITY SEALER OVER MIXING OF COAL

(No. 7119—*City Sealer*—O. W. H.—September 11, 1931—1 p.)

It is doubtful that supervision of the mixing of coal could be considered as "implied power" of the Inspector of Weights and Measures.

Citations:

Ordinances: Code '22: 988, 4167, 4177.

Creation of the Office of City Physician

The Department of Medical Examination and Emergency Treatment headed by the City Physician was established in 1932. The City Physician shall examine all city employees subject to the Workmen's Compensation act, all injured or ailing persons in police stations, dependent or delinquent children upon direction of the judge of the Juvenile Court, and, upon direction of the Corporation Counsel or police officer in charge of a police station, all causes of physical injury or illness alleged to result from defective streets and ways.—Coun. J. (1932-33), p. 2691.

BUILDING COMMISSIONER OWNING STOCK IN CONSTRUCTION COMPANY

(No. 7001—*Commissioner of Buildings*—L. H.—July 10, 1931—3½ pp.)

It is unlawful for the Commissioner of Buildings to hold stock in a construction company which does work for the city. He may, however, hold stock in a construction company which does work for other governments.

ISSUANCE OF DEPARTMENT OF BUILDING STARS

(No. 8974—*Deputy, Acting for Mayor, Department of Buildings*—A. A. S.—December 18, 1935—1 p.)

The head of the Department of Buildings has no authority to issue building inspector stars to persons not in his employ.

ELECTRICAL COMMISSION'S RELATIONSHIP TO CITY COUNCIL

(No. 8746—*Acting Commissioner of Streets and Electricity*—M. H. F.—April 17, 1935—4½ pp.)

The Electrical Commission provided by the State Electrical Equipment act is intended as a body to give the City Council reasonable adequate technical advice concerning electrical equipment, but the City Council may use its own judgment and is not required to reject

from any source recommendations or suggestions which may properly become a part of an ordinance.

Citations:

Statutes: SH '33, 24: 65 (101), 683a-683d.
Ill. Laws (1927), p. 234.

BOARD OF INSPECTORS OF HOUSE OF CORRECTION, QUALIFICATIONS AND POLITICAL STATUS

(No. 8401—Mayor—L. H.—May 21, 1934—1 p.)

Neither the qualifications nor the political status of the members of the Board of Inspectors of the House of Correction are prescribed in the statutes.

Citation:

Statute: Houses of Correction act, sec. 2.

HOUSE OF CORRECTION'S RELEASE OF PRISONERS

(No. 7569—Superintendent, House of Correction—S. A. M.—May 9, 1932—6 pp.)

An order of the Municipal Court which recalls or vacates an order of commitment should be disregarded unless the order is based upon a motion under section 89 of chapter 110 of Smith-Hurd's *Illinois Revised Statutes* (1931), and is issued within five years of the final judgment rendered.

A prisoner who has been adjudged a pauper, and is being held only because he has not paid his fine, should be released upon an order of the Municipal Court.

The Superintendent of the House of Correction should release a prisoner for whom a stay bond, a supersedeas bond, or a writ of habeas corpus is served.

Citations:

Statutes: SH '31, 110: 89.
Id. 38: 766.

Cases: *People v. Turney*, 273 Ill. 546 (1916).
People v. Whiteman, 277 Ill. 408 (1917).
People v. Crooks, 321 Ill. 266 (1926).
Central Bond and Mortgage Co. v. Roeser, 323 Ill. 90 (1927).
People v. Windes, 283 Ill. 254 (1918).
People v. Jaraslawski, 254 Ill. 299 (1912).

OPINION OF FOREGOING SYNOPSIS

We answer your letter, whereby you request an opinion on the following five questions:

1. Am I within the law in releasing a prisoner who has been sentenced by a judge of the Municipal Court of Chicago to a term of imprison-

ment of days, months or a year, before the expiration of the term, upon a certified copy of an order entered by the committing judge?

2. If so, what forms of order am I to honor?
3. Am I within the law in releasing a prisoner incarcerated for non-payment of a fine, upon a certified copy of an order entered by the committing judge, or a so-called pauper's petition?
4. Am I within the law in releasing a prisoner sentenced to the House of Correction by a judge of the Municipal Court of Chicago on a stay bond or supersedeas bond or on a bond of the Criminal Court in habeas corpus proceedings?
5. If so, what kind and form of a bond am I to honor?

The law applicable to the subject matter involved in question No. 1 is as follows:

"In criminal cases the general rule that a court may vacate its judgments during the term applies only while the judgment remains unexecuted, but it has no power to do so after the defendant has been sentenced and committed to the custody of the proper officer of the penitentiary or reformatory, as the defendant has then entered upon the execution of his sentence and the court has lost jurisdiction of his person." *People v. Turney*, 273 Ill. 546.

The case of *People v. Whittman*, 277 Ill. 408, contains a very extensive and exhaustive review of the law applicable upon the subject matter.

The court held:

"Section 21 of the Municipal Court act does not operate to give such court any more power in setting aside its judgments than is allowed the Circuit Court, and the Municipal Court cannot vacate a judgment of conviction and grant a new trial after the prisoner has begun serving his sentence, although such order is made within thirty days after the entry of the judgment."

Where the court attempts to recall or vacate its order of commitment, the prisoner should be retained in custody and you should not honor such an order from the Municipal Court. The fact that the order to vacate the commitment is issued within the term does not justify the court to enter such an order.

However, when the order of the Municipal Court is based upon a motion under section 89 of chapter 110, *Smith-Hurd's Revised Statutes*, 1931, then you must honor the order issued at any time within five years after the rendition of final judgment in the case.

We quote section 89:

"The writ of error *coram nobis* is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice. When the person entitled to make such motion shall be an infant, *non compos mentis* or under duress, at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years."

The syllabus in the case of *People v. Crooks*, 326 Ill. 266, contains the following, which is supported by the text:

"As a general rule, in criminal cases the court has no power to vacate its judgment after a defendant has been sentenced and has been committed to the custody of the proper officer of the penitentiary, as the

defendant has then begun serving the sentence and the court has lost jurisdiction of his person and of the cause.

"The rule that the court cannot vacate its judgment after sentence and commitment does not apply where there is any error in fact that may be corrected at common law by the writ of error *coram nobis*, or upon motion in writing under section 89 of the Practice act, and a motion to withdraw a plea of guilty under which the defendant was sentenced, supported by affidavits purporting to show errors in fact, may be regarded as a motion under section 89 and may be heard after the defendant has been imprisoned and is serving his sentence, or in vacation after the term has been adjourned; and the court may, upon a proper writ, have the defendant brought into court for such hearing, if necessary.

"A writ of error *coram nobis* or motion under section 89 of the Practice act lies to set aside a conviction obtained by duress or fraud, or where by some excusable mistake or ignorance of the accused, and without negligence on his part, he has been deprived of a defense which he could have used at his trial and which if known to the court would have prevented a conviction, or where the conviction is based on a plea forced by fear of mob law or by other fear induced by misconduct of the officers of the court or other officers of the law in whose custody the defendant was when the confession was obtained.

And in the case of the Central B. & M. Company v. Roeser, 323 Ill. 90, the court said:

"A motion to vacate a judgment under section 89 of the Practice act stands as a declaration in a new suit in which new issues are presented and upon which there must be a finding and a judgment; and a similar motion to vacate under section 21 of the Municipal Court act, after expiration of the time specified for modifying or vacating an order or judgment, is analogous to the motion under the Practice act."

By answering question No. 1 we have given you a full answer to question No. 2.

The answer to question No. 3 is that when the court passing upon what is known as a pauper's writ has adjudged the prisoner, who is being held solely because he had not paid a fine, a pauper, and unable to pay such fine, and has issued a writ or order to the effect, such writ or order should be honored by you. Such an order of discharge should contain a finding that not only the prisoner be a *pauper* but it must also show that he is *unable to work* out his fine. We base our opinion on the following Illinois Supreme Court decisions: (The People v. Windes, 283 Ill. 254; People v. Jaraslawski, 254 Ill. 299) and on section 766, chapter 38, Smith-Hurd's *Revised Statutes*, 1931. * * *

We will consider now your questions numbers four and five.

On a stay bond or supersedeas bond of the Municipal Court, the court assumes the responsibility and relieves the official who yields the custody of a prisoner in obedience to the court's order. In the case of a writ of habeas corpus the effect is the same. The order is issued in furtherance of one of the highest prerogative writs known to the law. Such an order is binding on all parties. It would be binding even on a court of equal or co-ordinate jurisdiction if directed to it in any case. The amount of a bond in habeas corpus proceedings is fixed and approved by the court.

The order of the court in each one of the cases above mentioned is full authority for the superintendent to follow and honor. It is not within the right or duty of the superintendent to look into the validity of the order in such cases.

* * * * *

HOUSE OF CORRECTION'S RELEASE OF PRISONERS— PAUPER'S WRIT

(No. 6916—Acting Superintendent, House of Correction—L. H.—May 25, 1931—3½ pp.)

The Superintendent of the House of Correction should comply with pauper's writs which direct the release of poor persons.

The Municipal Court has no power to vacate or amend a sentence of commitment after the prisoner has begun his sentence, and the Superintendent of the House of Correction should not release a prisoner for whom such a proceeding is attempted.

Citations:

- Cases:** People v. Turney, 273 Ill. 546 (1916).
People v. Whitman, 277 Ill. 406 (1917).
People v. La Buy, 285 Ill. 141 (1919).

SMOKE INSPECTION AND ABATEMENT COMMISSION

(No. 6646—Commissioner of Health—C. J. A.—April 23, 1930—4 pp.)

The *Rules and Regulations* of the Smoke Inspection and Abatement Commission appear to be within the limits of the authority granted to the commission by the ordinance under which it was appointed.

The City Council under its general police powers may create a Smoke Inspection and Abatement Commission.

The City Council, by ordinance, has specifically declared the emission of dense smoke to be a nuisance, and it may give the Smoke Inspection and Abatement Commission authority to make necessary rules or regulations for the enforcement of that ordinance. So long as these rules or regulations are reasonable and come within the general provisions of the ordinance, they are valid.

Citations:

- Statute:** Cities and Villages act, art. V, sec. 1, cl. 66, 75.
Cases: Spiegler v. Chicago, 216 Ill. 114 (1905).
Chicago v. Mandel Bros., 264 Ill. 216 (1914).
People v. Robertson, 302 Ill. 422 (1922).
Glucose Refining Co. v. Chicago, 138 Fed. 209 (1905).
Laugel v. City of Bushnell, 197 Ill. 20 (1902).
Harmon v. Chicago, 110 Ill. 400 (1884).
People v. Stokes, 281 Ill. 159 (1918).
People v. Reynolds 10 Ill. 1 (1848).

Department of Smoke Inspection and Abatement: *In 1931 a Department of Smoke Inspection and Abatement was established to regulate the installation and maintenance of fuel-burning equipment and the emission of smoke and noxious gases therefrom.—Coun. J. (1931-32), p. 1022.

**TAXICAB COMMISSION AUTHORIZATION OF ADDITIONAL
TAXIS**

(No. 8674—M. H. F.—February 15, 1935—1 p.)

A resolution that public convenience and necessity require the placing of additional taxicabs on the streets is necessary to make such an addition. The Taxicab Commission, in determining whether public convenience and necessity does so require, may take into consideration the population of the city.

Citation:

Ordinance: Coun. J. (1934-35), p. 2271 (Taxicab ord., sec. 6).

SECTION II

CITY EMPLOYEES

CHAPTER III

RIGHTS AND OBLIGATIONS OF CITY EMPLOYEES

INTRODUCTORY

To fulfill the diverse and numerous functions of municipal government, the City of Chicago employs a vast personnel. Doctors, lawyers, engineers, dentists, bacteriologists, nurses, librarians, chemists, statisticians, architects, draftsmen, plasterers, electricians, blacksmiths and a host of others covering the whole range of occupational activity make up the human cogs in the municipal machinery. There are over 25,000 persons in the governmental service of the city. Quite naturally, personnel problems play an important part in municipal administration.

This chapter discloses many of the differences and similarities between public and private employment. Two major distinctions, civil service and the annuity and benefit system are especially characteristic of public employment and are discussed in succeeding chapters.

From the fact that the employer is the city government, certain other distinctions arise. For example, a public employee derives his salary not by virtue of a contractual obligation directly between himself and his employer, but by virtue of his working in a position to which a salary is attached. To illustrate further the distinctions of public employment, the earnings of the employee find protection from debt claims by virtue of his position in public service, not because of any particular privilege enjoyed by the employee but because it has been held that the municipal corporation, as a matter of public policy, cannot be burdened with the collection of private debts. Other specific illustrations, such as vacation rights for military training, might also be cited.

On the other hand, similarities between public and private employment are many. The public employee is not immune from suit and in turn holds the privilege of suing his employer, the city. He is likewise given various benefits accruing to private employment, such as workmen's compensation.

Within the municipal service there occur variations of rights and obligations as between different groups of employees. For instance, policemen are excluded from the provisions of the State Workmen's

Compensation act but are given various other protections commensurate with the hazardous nature of their work. An even sharper illustration is found in the chapter on pension, annuity, and benefit funds. Here may be seen the diverse benefits and obligations for the various occupational groups.

A. GENERAL RIGHTS AND OBLIGATIONS

DISCIPLINING CITY EMPLOYEE FOR BANKRUPTCY

(No. 8749—Commissioner of Police—E. R. D.—April 20, 1935—3½ pp.)

The Federal Bankruptcy law is paramount to any city ordinance on the matter.

The city can take no action against municipal employees who file petitions in bankruptcy, whether to avoid just obligations or not.

Citation:

Case: In re Hicks, 133 Fed. 739 (1905).

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your communication, requesting an opinion as to whether or not some action can be taken against police officers who file petitions in bankruptcy, rather than meet their just obligations or who have no legitimate reason for going through bankruptcy.

The bankruptcy law is definite in its direction, that any person, except a municipal, railroad, insurance, banking or building and loan corporation shall be entitled to the benefits of bankruptcy as a voluntary bankrupt, and in this respect the District Court of New York, as reported in re Hicks, Federal Reporter, Vol. 133 at page 744 says:

"It is written in the Constitution of the United States that the Congress shall have power to enact uniform laws on the subject of bankruptcy. This is the paramount law of the land, and, Congress having exercised its legislative powers by enacting a general bankruptcy law, it is the duty of every citizen of every state, of every officer of every state, and of every officer of each city, county and town, to recognize, observe, respect, and bow to the provisions of that law. Congress has provided what debts are dischargeable in bankruptcy, and what are not. If the bankrupt surrenders his property, and complies with all the conditions of the act, and brings himself within its provisions, he is entitled to his discharge; and no state court or state law or municipal ordinance, under any guise or pretense whatever, can deprive the bankrupt of the benefits the national law says shall accrue to him; nor can any state, state court, municipal body, or municipal ordinance inflict any penalty or punishment, directly or indirectly, upon the bankrupt, for failing to pay the debts in full, from which the national law says he shall be discharged. Neither can any state, state or municipal law or ordinance, say that to take advantage of the national bankruptcy law is an act affecting either the character or the conduct or capacity of a citizen, so far as they relate to his right and capacity to continue in or hold a public office or position created either by the general government or by a state. To permit this would be to allow a state to punish one of its citizens for taking advantage of the benefits of a national law, the justice and beneficence of which no state or state or municipal law is permitted to question. * * *"

It may be taken as a general proposition of law, supported by the findings in the Hicks case, referred to above, that when an employee of a municipality avails himself of the provisions of the national bankruptcy act, as he lawfully may do, and which cannot lawfully be said affects his

character or standing as a citizen or employee. For the reason that his act is one the paramount law of the land says he may do, any action on the part of a municipality to inflict a punishment for his act by ordinance, rule or regulation, is a plain conflict between the provisions of the bankruptcy law and the ordinance, rule or regulation of the municipality involved. Both cannot stand together. There is no question that the bankruptcy act constitutes the paramount law, and the ordinance, rule or regulation of the municipality must yield.

The merit of the question of filing of petitions in bankruptcy by police officers rather than meeting their just obligations is one with which the City of Chicago, or its departments or departmental heads have no concern. Bankruptcy courts were not created for the purpose of aiding men to delay or defraud their creditors, but rather in the exercise of a public policy, the bankruptcy statute was created for the benefit, not of debtors, but of society at large. There is no doubt that unscrupulous and dishonest persons take advantage wherever they can of its provisions and although it does not seem that the bankruptcy act takes into account the motives of the principal parties to bankruptcy, it nevertheless concerns itself practically with the business relationship between debtor and creditor and with conditions as they exist, undertaking to fix definitely the rights and remedies of the parties to the action. It becomes the problem and the duty of the bankruptcy court through information it may obtain, to determine the motives of persons in seeking the benefits of the bankruptcy act, and to enforce what disciplinary action is necessary against them in event of fraud.

We are of the opinion that no action can be taken by the City of Chicago against police officers who file petitions in bankruptcy, whether to avoid just obligations or not. The determination of the rights between debtor and creditor is a matter delegated to the judicial branch of our government, and not to the executive branch thereof, of which the Police Department of the City of Chicago is an arm.

DISCIPLINING EMPLOYEE TO ENFORCE DEBT PAYMENT

(No. 8177—Commissioner of Police—L. H.—September 14, 1933—2 pp.)

The Commissioner of Police should take disciplinary action against a policeman for failure to pay debts incurred prior to his service as a policeman only where the circumstances are of so flagrant a nature that they indicate such dishonesty as would reflect discredit on the Police Department.

SUIT AGAINST CITY

(No. 8209—Chairman, Committee on Finance—C. N.—November 13, 1933—2 pp.)

An employee of the city may sue the city just as any other person.

Citation:

Case: *Hanrahan v. Chicago*, 289 Ill. 400 (1920).

NAME CHANGE BY CITY EMPLOYEE

(No. 8026—*Commissioner of Police—J. A. S.—April 21, 1933—3 pp.*)

If no fraudulent intent is involved, a city employee has a right to change his name without resorting to court proceedings. The statutory provisions for changing one's name by means of a court proceeding are elective and not mandatory.

Citations:

Statute: Cah. '31, 26: 1.

Cases: Canadian Bank v. McCrea, 106 Ill. 281 (1883).

Fingade v. Wilson Braiding and Embroidering Co., 205 Ill. App. 267 (1918).

Other references: 45 CJ 381 (16).

2 Sutherland, Statutory Construction, p. 1060, par. 573.

CANCELLATION AND RENEWAL OF EMPLOYEE'S SURETY BOND

(No. 6434—*City Comptroller—T. W. B.—May 13, 1929—2 pp.*)

It is contrary to the business policy of the city to cancel the surety bond on any employee at any time up to expiration of the bond or after the expiration of the bond. However, the Comptroller at the expiration of a bond may obtain another surety company to act as surety on the bond.

POSITIONS, ABOLITION OF

(No. 6968—*Mayor—L. H.—June 23, 1931—2½ pp.*)

A position for which the City Council has specifically appropriated funds can be abolished during the year for which the appropriation was made only by ordinance, as the appropriation is a mandate to the department head to fill the position.

Citation:

Case: People v. Chicago, 283 Ill. 462 (1918).

DISCHARGE THROUGH FAILURE TO APPROPRIATE

(No. 6590—*Commissioner of Health—J. W. B., F. J. C., F. J. V.—January 21, 1930—4½ pp.*)

When the City Council fails to appropriate and indicates no intention to appropriate for the salaries of certain employees in a department, the head of the department must discharge those employees and can reinstate them only at the direction of the City Council.

When the City Council fails to appropriate for the salaries of cer-

tain employees in a department and the Mayor vetoes the appropriations for that department, the veto, in the absence of further Council action, authorizes the reinstatement of those employees for whom no salary appropriation was made.

REDUCING NUMBER OF EMPLOYEES BY ORDINANCE

(No. 6580—*Chairman, Committee on Finance—E. C. H., F. J. V.—January 7, 1930—7 pp.*)

The Commissioner of Police or the Fire Commissioner cannot legally employ or continue in employment a greater number of persons than the City Council has provided payment for in the annual appropriation ordinance, and so must reduce their forces to bring the total number of their employees within the total amounts appropriated by the City Council for salary for their departments.

Citations:

- Ordinances: Coun. J. (1929-30), p. 27 (Annual appropriation ord.).
Coun. J., Jan. 3, 1930, sec. 2 (Salary and Current Expense ord.).
Code '22: 3067, as amended, Coun. J., Jan. 3, 1928, p. 1696.
Statute: SH '29, 24: 101.

NUMBER OF EMPLOYEES UNDER LUMP SUM APPROPRIATION

(No. 8073—*Chairman, Committee on Finance—L. H.—May 20, 1933—2½ pp.*)

Under a lump sum appropriation from bond funds for a given purpose the number of employees can be increased or diminished as occasion demands so long as the amount required to pay them in each instance is kept within the amount appropriated for the purpose. This, however, cannot be generally done under appropriations from the general corporate fund and cannot be done where separate appropriations are made for the amount required for salaries of a specified number of employees.

Citations:

- Statute: Cities and Villages act, art. VII, sec. 4.
Ordinance: Coun. J. (1932-33), p. 2394.

EMPLOYEE HOLDING TWO POSITIONS

(No. 7062—*Department Physician and Surgeon, Fire Department—L. H.—August 7, 1931—2 pp.*)

The holding by one man of positions as physician for the Fire Department and as medical examiner for the Firemen's Pension Board

is incompatible and not conducive to the proper and uncriticizable administration of the Fire Department and the pension fund even though it might be permitted under a technical construction of the law.

EMPLOYMENT OF PERSON RECEIVING PENSION

(No. 8467—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—July 13, 1934—3 pp.*)

The City Council has power to pass an ordinance making illegal the employment by the city of a person receiving a pension, unless said pensioner executes a waiver of his pension payments for the period of his employment. Such waiver is binding.

A person receiving a pension from the city has no right to further payment of such pension when he is receiving a salary from the city. However this does not preclude his right to his pension when receiving a salary from some private or other public corporation.

Citations:

- Cases: *People v. Retirement Board, Policemen's Annuity and Benefit Fund of Chicago*, 273 Ill. App. 387 (1933-34).
Allen v. Woodruff, 96 Ill. 11 (1880).
Brown v. Coon, 36 Ill. 243 (1864-65).

RECEIVING PENSION AND SALARY AT SAME TIME

(No. 6432—*Retirement Board, Municipal Employees' Annuity Benefit Fund—G. F. M.—May 9, 1929—3 pp.*)

No man can draw both a pension and a salary from the same municipality at the same time.

Pension payments made to a suspended or removed city employee who resigned and was later reinstated by a court order should be repaid to the pension fund.

Citation:

- Case: *People v. Chicago*, 286 Ill. 105 (1919).

Opinions No. 6583 of January 9, 1930 and No. 8695 of March 7, 1935 are in accord with the above opinion.

WAIVING PENSION DURING CITY EMPLOYMENT

(No. 7941—*Vice-President, Board of Education—G. F. M.—February 11, 1933—1 p.*)

A woman who is working as a janitress in a public high school in the city at the same time she is drawing a pension from the Fire-

men's Pension Fund should file a waiver of her pension payments during the period of her employment or else be removed from her position.

Citation:

Council order: Coun. J. (1931-32), p. 349 (Employment of pensioners).

VACATIONS WITH PAY

(No. 8114—*Commissioner of Public Works—L. H.—July 13, 1933—2 pp.*)

Vacations with pay may be granted by order of the City Council but not by the unauthorized direction of a department head.

Under the 1933 vacation and sick leave order, employees in the skilled labor and labor service employed on a per diem basis who have been absent more than thirty consecutive days in the year due to injury incurred in the line of duty, cannot obtain a vacation unless the Council changes its order.

Citation:

Ordinance: Coun. J. (1933-34), p. 126.

LIABILITY FOR FIREMEN'S DEATH DURING LUNCH HOUR

(No. 6705—*Chairman, Committee on Finance—H. M. S.—July 3, 1930 3 pp.*)

The city is liable to the family of a fireman engineer who drowned during his lunch hour while on duty on a fire boat.

Citations:

Ordinance: Coun. J. (1922-23), p. 217, as amended, Coun. J. (1925-26), p. 2152.

Case: *People v. Retirement Board*, 326 Ill. 583 (1928).

MEDICAL CARE AND SUPPORT OF INJURED POLICEMAN

(No. 7639—*Chairman, Committee on Finance—G. F. M.—July 6, 1932 —2½ pp.*)

Injuries occurring in the course of and arising out of the work of a policeman are injuries occurring "in the performance of an act or acts of duty" and policemen so injured are entitled to medical care and the support of their families.

Citations:

Statutes: SH '31, 24: 869a.

Ill. Laws (1927), p. 279.

Case: *People v. Retirement Board*, 326 Ill. 579 (1928).

B. SALARIES

(1) *Salary Payments*

SALARY OF POLICE OFFICER—SALARY DEDUCTIONS

(No. 7676—*Chairman, Committee on Finance—L. H.—July 30, 1932—4½ pp.*)

Where an employee is deemed an officer solely for purposes of his official duties, such as a peace or police officer, he may be treated as an employee in questions of salary.

An officer's salary, as fixed by the annual appropriation bill, must be paid in full, regardless of fact that he may not have put in full time in the service of the city; but this rule does not apply to employees.

Appropriations for annual salaries of employees are maximum appropriations and the City Council may provide for salary deductions for non-working days, such as Sundays and holidays.

Citations:

Ordinance: Coun. J. (1931-32), pp. 634, 1626.

Cases: Stott v. Chicago, 205 Ill. 281 (1903).

Moon v. Mayor, 214 Ill. 40 (1905).

Thomas v. Chicago, 273 Ill. 479 (1916).

Other reference: Dillon, Mun. Corp. (5th ed.), secs. 423, 425.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter to which was attached the claim of an ex-police officer for "back wages due to reduction in salary for a period of fourteen days in 1931 and sixteen days in 1932." You ask for a report on the legal question involved.

The determination of the rights of this former police officer necessarily determines the rights of all other officers and employees similarly situated; and it is therefore a question of great moment whether this party is entitled to the money he claims. There is a distinction between officers and employees in regard to their respective rights on the question of salaries, but we will treat the claimant as an employee, since his status as an officer does not relate to questions of salary but to the official duties of a peace officer. (Stott v. City of Chicago, 205 Ill. 281; Moon v. Mayor, 214 Ill. 40.)

An officer's salary, as fixed by the annual appropriation bill, must be paid to him in full, regardless of the fact that he may have failed to put in his full time in the service of the city.

This rule does not extend, however, to an employee of the city, whose compensation depends not only on the amount fixed in the appropriation bill but also on whether he has worked during all the time that he was employed.

"In the case of officers, the compensation—usually a salary—is attached to the office, as an incident, and is not dependent upon the performance of actual service, while the salary or compensation of an employee is intended as remuneration for services actually rendered and, generally speaking, can only be recovered in respect of services rendered or tendered

to the municipality."—(Dillon on *Municipal Corporations* (5th Ed.), Sec. 425.)

The appropriations for the annual salaries of employees are maximum appropriations. The amount appropriated cannot be exceeded when payments are made to the employee, but the appropriation does not carry with it the implication that the person employed must be kept at work at all times so that he can earn the full amount appropriated. The Civil Service law gives a civil service employee a certain status which precludes his displacement by another without cause, but it does not assure him the right to employment and wages when the City Council finds it necessary, by reason of lack of funds, lack of work, or other good cause, to lay him off. This has been definitely decided by our Supreme Court.

* * * * *

The deductions from the salary of the claimant in 1931 were made in pursuance of an ordinance passed by the City Council on July 10, 1931 (Council Journal, p. 634) * * * .

The deductions made in the year 1932 were made by virtue of an ordinance passed originally on January 4, 1932 (Council Journal, p. 1626) * * * .

It will be seen from the ordinances that the City Council proceeded on the theory that the whole time of employees, including Sundays and holidays, was appropriated for and that it was directing the heads of departments to make deductions only for such time of the employees as they did not work for the city.

There is necessarily some question on the point whether, in making the annual appropriations, the Council intended that the salary should be for only such time as excluded Sundays and holidays; but we are of the opinion that a court will not so construe the action of the Council in the face of the legislative interpretation which the Council has itself put upon its action by the two ordinances from which we quote.

Our conclusion with respect to the claim of the ex-officer, therefore, is that he would not be able to establish a legal right to the salary for the Sundays and holidays that he did not work which was deducted from the amount appropriated for the position.

* * * * *

SALARY DEDUCTION FOR POLICE DEPARTMENT SECRETARY

(No. 8185—*Commissioner of Police*—Q. O'B.—October 10, 1933—1 p.)

The secretary of the Police Department is a member of the Police Department, and is subject to the same consideration and treatment as the uniformed police force in the matter of salary deductions.

Citation:

Ordinance: Code '31: 277.

SALARY DEDUCTIONS IF WORKING SEVEN-DAY WEEK

(No. 7261—*Field Health Officer*—L. H.—November 5, 1931—1½ pp.)

Field health officers who work on an actual seven-day week basis, are not subject to the ordinance providing for the deduction of one-

day's pay for a total of not to exceed fourteen Sundays during the period from July 12, 1931 to December 31, 1931.

Citation:

Ordinance: Coun. J. (1931-32), p. 634.

SALARY DEDUCTIONS FROM POLICE AWARDS FOR HEROIC SERVICE

(No. 8066—*City Comptroller—L. H.—May 18, 1933—2½ pp.*)

Awards to policemen for heroic and meritorious service are salary enhancements to be considered as a part of the salary from which deductions can be made for days of non-work as provided in the appropriation ordinance.

Citation:

Ordinance: Coun. J. (1931-32), p. 4442 (Annual appropriation ord., sec. 8).

SALARY PAYMENT TO EMPLOYEE'S CREDITOR

(No. 7832—*C. N.—December 12, 1932—2 pp.*)

A police officer's past due salary cannot be paid by the city to his creditor to satisfy his debt without the consent of the municipal employee.

Citations:

Cases: Merwin v. Chicago, 45 Ill. 135 (1867).
Bartell v. Bauman, 12 Ill. App. 450 (1883).
Triebel v. Colburn, 64 Ill. 376 (1871-72).

SALARY AND VACATION RIGHTS WHILE ON MILITARY DUTY

(No. 6557—*President, Civil Service Commission—W. W.—December 9, 1929—3 pp.*)

Civil service employees must be paid their regular salary without prejudice to their regular vacations for the time they are absent from duties in order to attend the National Guard encampment, or any other military or naval exercise of like character which is sponsored by the state or federal governments under authority of law.

Citations:

Ordinance: Coun. J. (1929-30), p. 456.
Cases: Hogler v. Swall, 307 Ill. 460 (1923).
Taylor v. Thompson, 42 Ill. 9 (1860-67).
United States v. Realty Co., 163 U. S. 427 (1896).
Dagget v. Colgan, 92 Cal. 53 (1891).
Loan Association v. Topeka, 87 U. S. 655 (1874).

SALARY WHILE IN MILITARY TRAINING

(No. 7046—*Acting Fire Commissioner*—L. H.—July 31, 1931—2½ pp.)

The ordinance which authorizes leave of absence with pay of city employees who are members of the Illinois National Guard, Officers' Reserve Corps, etc., for purposes of participation in training, is valid, subject to the restriction in a recent ordinance requiring deduction of two days' pay in each month for all employees.

Citation:

Reference: Opinion No. 6557 (this volume, p. 149).

PAYMENT OF SALARY AS PAYROLL ITEM

(No. 7757—*Deputy Smoke Inspector in Charge*—L. H.—September 24, 1932—3 pp.)

Where a claim for salary is allowed, and an appropriation is made for it payable out of the general corporate fund, it makes no legal difference to the city whether the claim is paid as a payroll item or by warrant on a separate voucher.

Citations:

Ordinance: Coun. J. (1932-33), p. 2313 (Appropriation bill).

PROCEDURE IN PAYING RELIEF WORKERS

(No. 7296—*City Comptroller*—L. H.—November 13, 1931—4 pp.)

The procedure of paying persons assigned to the city by the Joint Committee on Relief from a special fund of money paid by this joint committee and kept separate from the city funds, is a safe one at the present, but when the 1932 appropriation bill is under consideration, steps should be taken to have the Council make an appropriation from this special fund.

Where relief employees are given the status of city employees, the fund from which they are paid must be treated as a city fund, even though the money is acquired from an unofficial source for a special purpose.

Citations:

Statute: Civil Service act, secs. 31, 32.

Case: *People v. Sergel*, 269 Ill. 619 (1915).

SALARY IN ABSENCE OF APPROPRIATION—BACK SALARY CLAIM*

(No. 7695—*Commissioner of Public Works—L. H.—August 6, 1932—1½ pp.*)

City employees may claim compensation for services only for the period for which an appropriation has been duly made and may not continue on the city's payroll if no appropriation is made for their continued employment.

Where back pay is due city employees, they can sue for and recover judgment to the extent of their salary due, but no more.

EMPLOYEE'S SALARY WHILE STATE LEGISLATOR

(No. 6823—*City Comptroller—C. J. A.—January 6, 1931—4 pp.*)

Although the city is not directly forbidden to pay a salary to a city employee or officer for time he puts in as a legislator, yet, it is suggested that the payment be withheld as not being equitably earned.

Citations:

Statute: SH '29, 24½: 42.

Other reference: Opinion No. 6814 (this volume, p. 81).

FIREMEN'S SALARY DURING DISABILITY

(No. 7730—*Acting Fire Commissioner—G. F. M.—August 23, 1932—3 pp.*)

Only firemen disabled or injured in such a way as could arise from the performance of fire duties, whatever be the cause of such injury or disability, are entitled to be carried on the payroll for a full year with full pay if disability lasts a full year or for such portion of a year as disability lasts; hence, this benefit does not extend to firemen disabled by syphilis.

Citation:

Ordinance: Code '31, sec. 390 (as amended).

PAYMENT OF SALARY TO CONSERVATOR

(No. 6514—*City Comptroller—J. W. B.—September 25, 1929—1 p.*)

A certified copy of letters of conservatorship is sufficient authority for the City Comptroller to turn over the checks of a city employee to the latter's conservator.

*See also opinions on pp. 143, 144.

SALARY PAYMENTS OF INSANE EMPLOYEE

(No. 8421—Mayor—J. A. S.—June 6, 1934—1½ pp.)

The City Paymaster has no authority to turn over to the mother of a former city water clerk, who is now confined to a sanitarium because of mental illness, the salary checks due her son. She should institute proceedings in the Probate Court to have herself or some other person appointed a conservator so that the City Paymaster may lawfully turn over the salary checks in question.

SALARY PAYMENT OF CITY EMPLOYEE ADJUDGED INSANE

(No. 8586—City Comptroller—C. N.—December 11, 1934—2½ pp.)

A discharge as "improved" from an insane asylum of a former municipal employee does not offset the court's adjudication of his insanity. Neither this employee nor anyone else except a conservator can secure his earnings that are being held by the city. Until the employee is adjudged sane or a conservator is appointed, the City Treasurer should not only pay out nothing, but should attempt to recover back monies already paid in error.

SALARY OF DE JURE OFFICER EXCLUDED FROM OFFICE

(No. 8820—City Comptroller—J. F. G.—July 18, 1935—4 pp.)

Ordinarily, a *de jure* officer wrongfully excluded from office can recover his salary from the city provided that the money has not been paid to any other person for performance of the duties of the office. A *de jure* officer can recover his salary from one who has been paid for the performance of the office.

Citations:

- Cases: Chicago v. Luthardt, 191 Ill. 516, 523 (1901).
Andrews v. City of Portland, 79 Me. 484 (1887).
Bullis v. Chicago, 235 Ill. 472 (1908).
Kreitz, Administratrix, v. Behrensmeyer, 149 Ill. 496 (1893-94).
Other reference: Dillon, Mun. Corp. (5th ed.), sec. 429.

LIABILITY TO DE JURE OFFICER IF SALARY PAID DE FACTO OFFICER

(No. 8329—Chairman, Committee on Finance—L. H.—March 13, 1934—3 pp.)

Where the city has paid in good faith the salary of an office to a *de facto* officer, no appropriation should be made to pay the *de jure* officer.

The liability of the city to a *de jure* officer after it has paid the salary in good faith to a *de facto* officer, is not entirely settled by the rule of *stare decisis*.

Citations:

- Cases: *People v. Schmidt*, 281 Ill. 211 (1918).
People v. Coffin, 279 Ill. 401 (1917).
People v. Burdett, 283 Ill. 124 (1918).
Krietz v. Behrensmeyer, 149 Ill. 496 (1893-94).

RECOVERY OF SALARY PAID DE FACTO OFFICER

(No. 8823—Chairman, Committee on Finance—J. F. G.—July 20, 1935—2 pp.)

The payment of salary to a *de facto* officer of the city is a good defense to a suit against the city by the *de jure* officer for that salary.

Citations:

- Cases: *Hittell v. Chicago*, 327 Ill. 443 (1928).
O'Connor v. Chicago, 327 Ill. 586 (1928).

SALARY OF CHIEF PROBATION OFFICER

(No. 8747—City Comptroller—J. F. G.—April 17, 1935—3 pp.)

The salary for 1935 of the Chief Probation Officer in the Adult Probation Department of Cook County not having been fixed by any order of the Circuit, Superior, and Municipal Courts as required by law, the minimum salary of \$5,000 a year fixed by law should be the salary paid to him.

Citations:

- Statute: SH '33, 38: 797.
Case: *People v. Chicago*, 351 Ill. 396 (1933).

(2) Deceased Employee's Salary

DISPOSITION OF SALARY OF DECEASED EMPLOYEE

(No. 7074—City Comptroller—E. Broz.—August 15, 1931—2 pp.)

In the handling by the Comptroller of salary due to a deceased municipal employee, an estate in the name of deceased should be opened in the Cook County Probate Court and proper steps taken therein or all heirs should sign a proper power of attorney and the salary shall be paid to them if they post a bond indemnifying the city for any damages it might sustain because of such payment.

PROBATING ESTATE FOR SALARY DUE DECEASED EMPLOYEE

(No. 8008—City Comptroller—Jud. G.—April 10, 1933—2½ pp.)

When there are pay checks due to a deceased city employee who has an estate of more than \$500.00, the City Comptroller should not comply with the request of a relative of the employee that probaton of the estate be waived.

Citation:

Case: Van Meter v. Ill. Merchants Trust Co., 239 Ill. App. 616 (1925-26).

CONFLICTING CLAIMS TO DECEASED EMPLOYEE'S SALARY

(No. 7978—City Comptroller—M. H. F.—March 24, 1933—3 pp.)

Where there are a number of conflicting claims for back salary due a deceased employee of the city, the Comptroller should withhold that back salary until application is made to Probate Court for the issuance of letters testamentary or of administration in the estate of the deceased employee. Upon being furnished certified copies of those letters, the Comptroller should pay out the back salary according to directions of the court.

DISBURSEMENT OF SALARY OF DECEASED EMPLOYEE

(No. 8189—City Comptroller—M. H. F.—October 15, 1933—3 pp.)

The Comptroller should not attempt to adjust the conflicting claims of the heirs of a deceased city employee to a pay check of the employee and he should disburse said check to such claimants only upon receiving a receipt or release from all the known claimants accompanied by evidence to the effect that these are all the known claimants or to a personal representative appointed by the Probate Court in adjusting the estate of such employee only upon the receipt of a certified copy of the evidence of such representation.

Opinion No. 8198 of October 28, 1933, to the City Comptroller is in accord with the above opinion.

UNDERTAKER'S CLAIM TO DECEASED'S SALARY

(No. 8804—City Comptroller—M. H. F.—June 26, 1935—2 pp.)

Because of the rival claims of an undertaker and individuals claiming as heirs, the City Comptroller should pay salary deduction money due a deceased employee only to a duly appointed administrator or after having received evidence of heirship, information as to the

claims of creditors, and upon receipts and releases executed by all of the heirs and creditors.

Opinion No. 8364 of April 14, 1934, to the City Comptroller is in accord with the above opinion.

PAYMENT OF DECEASED'S SALARY TO UNDERTAKER

(No. 8385—City Comptroller—O. W. H.—May 11, 1934—1½ pp.)

Back wages of a deceased city employee may be paid to the undertaker upon affidavit of the nearest of kin, stating the facts, unless the estate is over \$500, in which case the estate should be probated and back wages paid only to the executor or administrator.

PAYMENT OF DECEASED'S SALARY FOR FUNERAL EXPENSES

(No. 8736—City Comptroller—R. D. K.—April 4, 1935—2½ pp.)

The funeral expenses of a deceased person are a primary debt against his estate.

When a municipal employee has died intestate with a small amount of pay still due him, the Comptroller may pay this amount to the deceased's brother to apply on the funeral expenses when the brother presents an affidavit to the effect that he has personally paid those expenses; or, the Comptroller may pay the amount to the undertaker upon the presentation of a bill for an amount equal to the money due the deceased employee.

Citation:

Statute: SH '33, 39: 1.

SALARY OF DECEASED DE JURE OFFICER ILLEGALLY DISCHARGED

(No. 8792—R. D. K.—June 11, 1935—1½ pp.)

A person who paid the funeral expenses of a deceased employee of an abolished city bureau may not be reimbursed for those expenses although the positions in the abolished bureau had been subsequently restored by an action of mandamus and the employees reinstated in them, because the salary for those employees, *de jure* officers, was paid to persons doing their work, *de facto* officers, after the bureau had been abolished.

LIENS AGAINST SALARY OF DECEASED EMPLOYEE

(No. 8086—*City Comptroller—E. R. D.—June 8, 1933—1 p.*)

The demand by a deceased city employee's creditor should not be considered as a lien on salary due the deceased employee, since the salary becomes part of his estate.

SALARY PAYMENT FOR EARNED VACATION OF DECEASED OFFICER

(No. 8826—*City Comptroller—J. F. G.—July 24, 1935—1½ pp.*)

Death terminates the incumbency of an office and the payment of salary for any period after the death of an officer is an unlawful diversion of public funds.

The widow of a deceased city officer can not be paid salary for a vacation earned but not taken by the officer at the time of his death.

(3) *Creditor's Claims Against Salary**

GARNISHMENT AND ATTACHMENT OF SALARIES

(No. 7990—*C. N.—April 3, 1933—3½ pp.*)

The ordinary processes of garnishment and attachment may not be used in the collection of private debts from city employees.

Citations:

- Cases: Merwin v. Chicago, 45 Ill. 135 (1867).
Bartell v. Bauman, 12 Ill. App. 450 (1883).
Triebel v. Colburn, 64 Ill. 376 (1871-72).

Opinion No. 8683 of February 25, 1935 is in accord with the above opinion.

JUDGMENT AGAINST EMPLOYEE

(No. 7982—*City Comptroller—M. H. F.—March 25, 1933—1½ pp.*)

As the city may not be garnisheed, receipt of a certified transcript of judgment against a city employee may be ignored and the salary due that employee should be paid to him.

Citation:

Reference: Op. Corp. Counsel (1913-14), p. 404.

Opinions No. 7752 of September 21, 1932, and No. 8018 of April 17, 1933, both to the City Comptroller, are in accord with the above opinion.

*See also Opinion No. 6742, p. 125, and Opinion No. 8177, p. 142.

SALARY PAYMENTS TO HOLDER OF EMPLOYEE'S IDENTIFICATION RECEIPT

(No. 7879—City Comptroller—L. H.—January 4, 1933—2½ pp.)

The City Comptroller has no authority to turn over a pay check due a former employee to a person holding such employee's identification receipt, when such action would be contrary to the wishes of the former employee.

The city is not liable in garnishment proceedings.

WITHHOLDING SALARY ON REQUEST

(No. 8293—City Comptroller—E. L. M.—February 5, 1934—1½ pp.)

The Comptroller cannot, upon a mere request to withhold payment of salary, legally refuse to deliver salary checks to an employee when the salary has been earned, money for payment is available and the salary has been ordered paid by the proper officers.

SALARY PAYMENTS TO OTHERS BY COURT DECREE

(No. 6799—City Comptroller—F. J. V.—November 17, 1930—2½ pp.)

Where a municipal employee permits a decree assigning a portion of his salary toward the payment of a judgment to become final, he has no valid claim against the Comptroller for following the decree.

Where a court decree orders a portion of a municipal employee's salary to be applied to pay judgments and he failed to set up that his salary as a civil service employee was not subject to seizure by a creditor's bill, he is as much bound by the decree, as if he had pleaded this defense.

Where a municipal employee accepts the portion of his salary directed by court decree to be paid to him, he acquiesces in the court decree.

CLAIMS OF POWER OF ATTORNEY AGAINST SALARY

(No. 8058—City Comptroller—J. A. S.—May 15, 1933—2½ pp.)

The Comptroller is not legally bound to recognize a claim by a creditor of a former city fireman against back salary due the fireman from the city. The fact that the fireman has executed a power of attorney in favor of the creditor does not alter the case.

SALARY OF BANKRUPT EMPLOYEE

(No. 8212—City Comptroller—E. L. M.—November 14, 1933—2 pp.)

The Comptroller should comply with the order of the referee in bankruptcy and turn over to the trustee the amount of salary earned and unpaid to a city policeman at the time of the filing of a petition of bankruptcy by that policeman.

Salary earned and unpaid to the policeman since his adjudication as a bankrupt belongs to him and is not a part of his estate in bankruptcy.

Citation:

Case: *In re Driggs*, 171 Fed. 897 (1909).

CLAIMS AGAINST INDEPENDENT CONTRACTOR WORKING FOR CITY

(No. 8627—Comptroller—C. N.—January 14, 1935—1½ pp.)

Where a person engages in special hauling work for the city from time to time as an independent contractor, is not on the regular pay roll and has no written contract with the city, he cannot be considered a regular city employee. The Comptroller should abide by the contract entered into by this person and his creditors, regarding the disposal of his earnings.

*(4) Assignment of Salaries***SALARY ASSIGNMENT WHEN UNEARNED**

(No. 6908—C. J. A.—May 19, 1931—1½ pp.)

The assignment by a public official or employee of unearned salary, wages, or fees is void as against public policy.

Citations:

Cases: *Bowery Bank v. Wilson*, 122 N. Y. 478 (1890).
Merwin v. Chicago, 45 Ill. 133 (1867).
Badenoch v. Chicago, 122 Ill. 71 (1887-88).
Addyston Pipe and Steel Co. v. Chicago, 170 Ill. 580 (1897-98).
Lamb v. Lamb, 256 Ill. App. 226 (1930).

Other reference: 1 *Dillon, Mun. Corp.* (5th ed.), sec. 428.

Opinions No. 6672 of May 14, 1930, and No. 8106 of June 30, 1933, both to the City Comptroller, and No. 8214 of November 15, 1933, to the Commissioner of Public Works all discuss the same point as the above opinion.

ASSIGNMENT OF EARNED SALARIES

(No. 8886—*E. R. D.*—September 27, 1935—2½ pp.)

The city is not compelled to honor assignments of earned salaries, as the municipality cannot be turned into an agency for the collection of private debts.

Opinions No. 8091 of June 10, 1933, No. 8780 of May 27, 1935, and No. 8785 of June 3, 1935, all to the City Comptroller, discuss the same point as the above opinion.

ASSIGNMENT OF SALARY ALREADY PAID

(No. 8500—*City Comptroller—M. H. F.*—September 7, 1934—2½ pp.)

A municipal officer cannot assign his unearned salary.

The City Comptroller may refuse to honor a dated assignment of wages executed by a municipal employee purporting to assign wages "due" him from the city, when such assignment is presented after all wages due such employee up to the date of the assignment have been paid.

Citations:

Case: *Chicago v. People*, 98 Ill. App. 517 (1902).

Other references: 15 Op. Corp. Counsel, p. 588.
Op. Corp. Counsel (1907-08), p. 238.

ASSIGNMENT OF EARNED SALARIES—CONTRACTOR'S LIEN

(No. 7699—*City Comptroller—Jud. G.*—August 8, 1932—2½ pp.)

City employees, including contractors employed to remove rubbish from alleys or similar work, may not assign salary not yet due or to be earned in the future. If assignments are for salary or wages due at the time the assignments are executed, and there are no other claims or objections against their payment, the Comptroller may pay the wages or salary to the assignee of the employee but if anyone does object to such payment, the Comptroller should pay the salary directly to the employee.

Any person who furnishes material, fixtures, apparatus, machinery or labor to a contractor having a contract for a permanent public improvement with the city has a lien on the money, bond or warrants due or to become due such contractor under such contract.

Citations:

Statute: SH '31, 82: 23 (Mechanics' Lien act).

Cases: *Fehr Construction Co. v. Postl System*, 189 Ill. App. 519 (1915).

Chicago v. Blair, 149 Ill. 310 (1893-94).

Johnson v. Pace, 78 Ill. 143 (1875).

Chicago v. People, 98 Ill. App. 520 (1902).

Other reference: 2 McQuillin, *Mun. Corp.* (2nd ed.), sec. 543.

ASSIGNMENT OF SALARY IDENTIFICATION SLIP

(No. 7963—City Comptroller—A. F. G.—March 8, 1933—2 pp.)

A municipal officer cannot assign his unearned salary.

Salary identification slips are not negotiable.

The Comptroller is not required to withhold an employee's salary checks when identification slips held by the employee's creditor have not in any manner properly assigned the employee's salary to the creditor.

SALARY ASSIGNMENT BY ENDORSING SALARY IDENTIFICATION SLIPS

(No. 8362—City Comptroller—A. F. G.—April 12, 1934—2½ pp.)

A municipal officer cannot assign his unearned salary.

The issuance of salary identification slips raises the presumption that the salary has been earned.

Where a creditor of a deceased municipal employee presents salary identification slips endorsed by said employees in favor of the creditor, the salary checks therefore may be paid to said creditor upon his filing a bond to indemnify the Comptroller against loss; provided however, that if an administrator has been appointed for the deceased's estate the salary checks should be paid to such administrator and said creditor may then file a claim in the Probate Court for adjudication.

Where the creditor of a deceased municipal employee possesses salary identification slips which are not endorsed by said employee, the Comptroller should pay the salary checks therefor to the administrator of the deceased's estate or to his heirs, if no administrator has been appointed.

RULES OF ASSIGNMENT OF SALARIES

(No. 8774—City Comptroller—C. N.—May 23, 1935—2½ pp.)

An assignment of the wages of a city employee which was not in accordance with rules laid down for assignments should not be honored.

Citation:

Case: Merwin v. Chicago, 45 Ill. 133 (1867).

ASSIGNMENT OF WARRANT FOR WAGES

(No. 7176—*City Comptroller—F. J. B.—October 8, 1931—3 pp.*)

An assignment by a public employee of unearned wages is absolutely void. An assignment of a warrant representing wages that have become due, even when the assignment has been executed in good faith and there are no conflicting claims, transfers only an equitable title to the assignee to whom the warrant was delivered. Thus the city may safely pay its employees what it owes them and allow the creditors to collect their claims from the employees themselves.

Citations:

Cases: Bowery Bank v. Wilson, 122 N. Y. 478 (1890).

Bangs v. Dunn, 66 Cal. 72 (1884).

Merwin v. Chicago, 45 Ill. 133 (1867).

Lamb v. Lamb, 256 Ill. App. 226 (1930).

Other reference: 1 Dillon, Mun. Corp. (5th ed.), sec. 428.

ASSIGNMENT OF WARRANT FOR SALARY

(No. 6970—*City Comptroller—C. J. A.—June 24, 1931—3½ pp.*)

Pay checks and other warrants issued by one municipal officer against another officer of the same municipality are not negotiable instruments. The assignee of a warrant for salary, wages, or fees due, whether the assignment be made by endorsement on the warrant or by a separate document, does not acquire the legal title to the warrant but only an equitable interest in it.

Where an equitable assignment has been made in good faith and there appears to be no dispute in the matter, the Comptroller may safely recognize the assignment and deliver the warrant to the assignee.

Where the validity of an assignment is questionable, the comptroller may insist upon delivering the warrant to the holder of the legal title, and let the creditors take such action against that holder as they see fit.

Citations:

Cases: People v. Johnson, 100 Ill. 537 (1881).

Morrison v. Austin State Bank, 213 Ill. 472 (1904-05).

Mayor v. Ray, 86 U. S. 468 (1874).

Merwin v. Chicago, 45 Ill. 133 (1867).

Addyston Pipe and Steel Co. v. Chicago, 170 Ill. 580 (1897-98).

Lamb v. Lamb, 256 Ill. App. 226 (1930).

Other reference: Dillon, Mun. Corp. (5th ed.), sec. 856.

WAGE ASSIGNMENT BY CONTRACTOR

(No. 6924—City Comptroller—C. J. A.—June 2, 1931—2½ pp.)

The assignment by a public employee of unearned salary, fees or wages, is void as against public policy.

A wage assignment does not cover money to be paid an independent contractor, since unearned wages cannot be assigned and, if the monies to be paid are considered as other than wages, a wage assignment would not cover them.

Citations:

Cases: Bowery Bank v. Wilson, 122 N. Y. 478 (1890).

Merwin v. Chicago, 45 Ill. 133 (1867).

Badenoch v. Chicago, 122 Ill. 71 (1877-78).

Addyston Pipe and Steel Co. v. Chicago, 170 Ill. 580 (1897-98).

Lamb v. Lamb, 256 Ill. App. 226 (1930).

Other reference: 1 Dillon, Mun. Corp. (5th ed.), sec. 428.

(5) *Salary Rights in Discharge or Suspension*

SALARY CLAIM FOR PERIOD OF ILLEGAL DISCHARGE

(No. 8822—Chairman, Committee on Finance—Q. O'B.—July 19, 1935—2 pp.)

A policeman who was unlawfully removed, and who was suspended at no time during that period of unlawful removal, has the right to recover his full salary for that period, as well as the right to continue in the performance of his duties.

Citation:

Case: Thomas v. Chicago, 273 Ill. 479 (1916).

SALARY CLAIMS FOR PERIOD OF LEGAL DISCHARGE

(No. 7026—Committee on Finance—F. J. V.—July 24, 1931—2 pp.)

A policeman who had been legally discharged and later reinstated by administrative grace is not entitled to back salary for the period of his discharge.

Citations:

Cases: Carroll v. Houston, 341 Ill. 531 (1931).

O'Connor v. Chicago, 327 Ill. 586 (1928).

SALARY PAYMENTS TO DE FACTO OFFICER

(No. 7392—Chairman, Finance Committee—F. J. V.—December 18, 1931—2 pp.)

Payment to *de facto* employees who have rendered service, is a good defense to a claim for back salary by an employee who has been

unlawfully discharged, to the extent that the money sought to be recovered has been paid to the *de facto* employees.

Citations:

- Cases: O'Connor v. Chicago, 327 Ill. 586 (1928).
Hittel v. Chicago, 327 Ill. 443 (1928).

REINSTATEMENT AND BACK SALARY CLAIM

(No. 6670—*City Comptroller—F. J. V.—May 14, 1930—2 pp.*)

A judgment for the reinstatement of an employee does not constitute a salary judgment against the city on which a lien may be predicated. The right of action for back salary does not accrue until the employee is reinstated to his former position.

Citations:

- Cases: Chicago v. People, 210 Ill. 64 (1904).
Kenyon v. Chicago, 135 Ill. App. 227 (1908).
Bullis v. Chicago, 235 Ill. 472 (1908).

REINSTATED FIREMEN FAILING TO REPORT FOR DUTY

(No. 7915—*Acting Fire Commissioner—F. J. V.—January 25, 1933—1½ pp.*)

A fireman who had been notified to appear for an assignment to duty after the quashing of his record of discharge, but failed to appear for duty and presented only a doctor's certificate that he could not report because of his former disability for which he has been on the disability pension, is not entitled to any salary and thus to no place on the current pay rolls.

SALARY RIGHTS IF REEMPLOYED IN LOWER POSITION

(No. 8057—*Chairman, Committee on Finance—Jud. G.—May 15, 1933—2 pp.*)

A person who was laid off as an assistant engineer and was subsequently employed as junior engineer and paid in the second position at lower rate than in the former, is not entitled to the difference in compensation as the City Council in its annual budget did not appropriate for his position as assistant engineer.

SALARY CLAIMS FOR SUSPENSION PERIOD

(No. 8063—*Chairman, Committee on Finance—Jud. G.—May 16, 1933—1½ pp.*)

The city is not liable for salary payments for the period of suspension of a senior bookkeeper of the Department of Finance who was

suspended due to the failure of the City Council to appropriate for his position and later reemployed as senior clerk by the Bureau of Water.

PAY OF DAY LABORER FOR TIME ABSENT

(No. 7521—*Commissioner of Public Works—Jud. G.—March 29, 1932—1 p.*)

A day laborer working for the city is not entitled to pay for the time during which he is absent.

C. WORKMEN'S COMPENSATION

COMPENSATION FOR CITY EMPLOYEES—LIABILITY FOR DAMAGE IN GOVERNMENTAL FUNCTION

(No. 8025—*President, Board of Health—J. F. G.—April 21, 1933—2 pp.*)

The city is liable, under the Workmen's Compensation act, to any of its employees for any injury arising during the course of his employment.

Neither the president of the Board of Health nor the City Council has authority to indemnify the Century of Progress Exposition for injuries which might occur to persons or property at the Board of Health exhibit.

The city is not liable to the public for the negligence of its employees while engaged in the performance of governmental functions or in the exercise of the city's police powers.

The Board of Health exercises police power of the city and performs only governmental duties.

Relief Employees: A municipality is liable under the Workmen's Compensation act for workmen sent by a relief organization to work for the municipality where the municipality has the right to control, direct or discharge them.—*Forest Preserve District v. Industrial Commission*, 357 Ill. 389 (1935).

LUMP SUM PAYMENTS OF COMPENSATION

(No. 8850—*Chairman, Committee on Finance—T. A. M.—August 16, 1935—4 pp.*)

The Industrial Commission may compel the city to pay workmen's compensation in a lump sum.

Citations:

Statute: Cah. '33, 48: 209, 219.

Case: *Schworm v. Thomson and Sons Co.*, 281 Ill. 486 (1918).

LUMP SUM SETTLEMENTS OF COMPENSATION

(No. 8133—City Comptroller—J. J. O.—August 1, 1933—3½ pp.)

The Industrial Commission may refuse to permit lump sum settlements of workmen's compensation awards even though the employer consents thereto.

Citation:

Statute: Cah. '31, 48: 9, 23.

Lump Sum Settlement: An act permits the commission, acting on the petition of an employer, employee, or beneficiary to order a lump sum settlement of compensation or any unpaid portion of it, if it is to the best interest of all parties. But when there is a complete disability, the petition is not to be entertained until after six months of the date of the injury.—Ill. Laws (1931), p. 588.

PAYMENT OF COMPENSATION AWARD TO ANOTHER

(No. 7522—M. C. A.—March 31, 1932—1½ pp.)

The Workmen's Compensation act gives no authority to the employer to pay any part of the proceeds of an award to anyone but the petitioner in the case.

Citations:

Statute: Workmen's Compensation act (1931), sec. 21.

Case: Lasley v. Tazewell Coal Co., 223 Ill. App. 462 (1921-22).

ASSIGNMENT OF WORKMEN'S COMPENSATION AWARD

(No. 8113—City Comptroller—A. M. S. and J. J. O.—July 13, 1933—6½ pp.)

Authorization by an employee to others to receive his unendorsed workmen's compensation checks and endorse them with his name are, in effect, assignments or waivers of workmen's compensation awards which are prohibited by law; hence the city should make payment of the award to the injured city employee regardless of such authorizations.

Citation:

Statute: Cah. '31, 48: 21, 23.

Opinion No. 7734 of August 25, 1932, to the City Comptroller discusses the same subject as the above opinion.

ATTORNEY'S LIEN ON COMPENSATION AWARD

(No. 8219—*City Comptroller—A. M. S. and J. J. O.—November 17, 1933—9½ pp.*)

The claims of an attorney or a collection agency for services rendered in a workmen's compensation suit cannot subject the workmen's compensation award to a lien.

Citation:

Statute: Cah. '31, 48: 19, 21, 23, 33.

**WITHHOLDING PAYMENT OF COMPENSATION AWARD—
ATTORNEY'S LIEN**

(No. 7949—*City Comptroller—J. J. O.—February 17, 1935—6½ pp.*)

Where an employee himself causes the delay in payment of a workmen's compensation award and there is doubt as to who is entitled to receive the check due to him, the City Comptroller is justified in withholding delivery of the check until the rights of the interested parties are settled.

A workmen's compensation claim is not subject to lien or assignment and thus a power of attorney is not available to an attorney in a workmen's compensation case to allow him a lien to secure his fee for the handling of such case.

Citations:

Statutes: Cah. '31, 13: 13 (Attorney's Lien act).

Id., 48: 7(g), 16, 19(k), 21 (Workmen's Compensation act).

Administrative Rule: Industrial Board, General Rules, Rule III, p. 32.

POLICEMEN'S RIGHT TO COMPENSATION

(No. 8714—*Commissioner of Police—J. J. O.—March 14, 1935—2 pp.*)

Members of the uniform rank of the Police Department and all employees of the department designated as policemen who have been regularly appointed and sworn in the same manner as police patrolmen are sworn, are not employees of the city within the meaning of the Workmen's Compensation act, and do not come within the provisions of that act.

Citations:

Statute: SH '33, 48: 142.

Ordinance: Code '31: 277 (Designation of policemen).

Case: Chicago v. Industrial Commission, 291 Ill. 23 (1920).

POLICE HOSTLER'S RIGHT TO COMPENSATION

(No. 7262—*Chairman, Committee on Finance—J. J. O.—November 6, 1931—3½ pp.*)

Hostlers in the Police Department who have been regularly sworn in as policemen of the city, are not "employees" within the meaning of the Workmen's Compensation act and are not subject to its provisions.

Citations:

- Statutes:** Cah. '29, 48: 205.
Cah. '31, 24: 914 (12).
Ordinance: Code '31: 227.
Case: Chicago v. Industrial Commission, 291 Ill. 23 (1920).

**COMPENSATION FOR PUBLIC WELFARE EMPLOYEES—
DAMAGE LIABILITY OF CHARITABLE INSTITUTIONS**

(No. 8032—*Commissioner of Public Works—D. H. N.—April 26, 1933—3½ pp.*)

Inmates of a city shelter who are employed in it in various capacities, receiving as compensation a small monthly wage plus food and lodging, come under the provisions of the Workmen's Compensation act.

Employees of the Department of Welfare come under provisions of the Workmen's Compensation act.

Charitable institutions, both private and public, are not liable for negligence of their employees.

The city is not liable for injuries sustained by inmates in or about a city shelter who receive food or lodging.

Citations:

- Cases:** Lindler v. Columbia Hospital, 96 S. C. 25 (1913).
Pratt v. Davis, 224 Ill. 300 (1906-07).
Thomas v. German General Benevolent Society, 168 Cal. 183 (1914).
Hogan v. Chicago Lying-In Hospital, 335 Ill. 42 (1929).
Parks v. Northwestern University, 218 Ill. 381 (1905).
Chicago v. Industrial Commission, 291 Ill. 23 (1920).

CHAPTER IV

CIVIL SERVICE

Civil service was adopted in Chicago in 1895 by a municipal referendum, which accepted the provisions of a state Civil Service statute enacted earlier in the year. This act was very comprehensive and has received little change since that time.

Practically the entire personnel of the city has been brought under civil service. However, certain positions are specifically exempted therefrom by statute: these include elected officers, officials whose appointments are subject to confirmation by the City Council, heads of principal city departments, members of the Law Department, police officers above the rank of captain, and one private secretary of the Mayor.

The administration of the civil service is entrusted to a Civil Service Commission of three members holding three-year terms, one retiring each year. It is responsible for the classification of city positions according to salaries and duties. It also provides medical, physical, and practical examinations for all persons desiring to enter the service or seeking promotion. All civil service vacancies are filled by the commission through certification of eligibles upon the request of department heads.

The Civil Service Commission is also the sole authority for ordering the discharge of civil service employees although department heads may suspend them, with good cause, for a period not exceeding thirty days. In deciding whether an employee shall be discharged, the Civil Service Commission sits as a quasi-judicial body and hears charges preferred against the employee. Its decisions are subject to review by the courts only to determine whether the commission has conformed to law and the requirements of legal procedure.

Civil service is one of the unique features of public employment. It arranges the municipal personnel in an organized pattern through classification and establishes this classification upon the basis of equal pay for equal work. Furthermore, it places appointment on a competitive basis. For the employee, it is designed to secure permanent tenure and an equal justice in promotion and discipline. All these are conducive to a heightened efficiency in public employment and this is the central object of civil service.

A. ADMINISTRATION OF CIVIL SERVICE

(1) *Powers of Administration**

CITY COUNCIL'S POWERS OVER CIVIL SERVICE RULES

(No. 6611—*Committee on Schools, Fire and Civil Service—F. J. V.—March 3, 1930—1½ pp.*)

The City Council has no power over the rules and regulations of the Civil Service Commission, as this power is expressly vested in the commission by the Civil Service act. The Council can only submit recommendations for changes in the rules and regulations of the commission.

Citation:

Statute: Civil Service act, sec. IV.

POWER OVER SALARIES AND CLASSIFICATION

(No. 7719—*Commissioner of Public Works—L. H.—August 17, 1932—4 pp.*)

The Civil Service Commission has nothing to do with salaries except to consider them in determining in what grade or class a position belongs; in making a classification, the commission must necessarily follow trends of salaries as fixed by the City Council.

The City Council has complete discretion in fixing salaries for civil service positions and is not bound to follow the Civil Service Commission classifications in so doing.

When a salary for a given position places an officer or employee in a salary rank that does not correspond to similar positions, a question of seniority as to who shall fill the position may arise, but the salary appropriation is valid.

A bonded employee who approves a pay roll in accordance with an appropriation bill would not be liable if the salary increase in the appropriation was improper.

Citation:

Statute: SH '31, 24½: 3.

*See also Opinion No. 6925, p. 184, and Opinion No. 7312, p. 189, on powers of department heads, the City Council, and the Civil Service Commission.

**CIVIL SERVICE COMMISSION'S JURISDICTION—DISMISSAL
AND FINES**

(No. 7556—*President, Civil Service Commission—F. J. V.—April 23, 1932—3 pp.*)

The Civil Service Commission is a quasi-judicial body, an arm of the executive branch of the government, and possesses only those powers given it by the Civil Service act.

The jurisdiction of the Civil Service Commission in the matter of charges against those in the civil service is limited to sustaining the charges and removing the employees or to dismissing the charges. The Civil Service Commission has no power to impose fines or to direct the department heads to impose fines.

The power to suspend is vested exclusively in the department heads and is not subject to any direction by the Civil Service Commission.

Citations:

Statute:	Civil Service act, sec. 12.
Administrative rule:	Police Department, secs. 5, 6.
Case:	Thomas v. Chicago, 273 Ill. 479 (1916).

OPINION OF FOREGOING SYNOPSIS

We have your recent communication referring to (our) letter in which explanation of the following paragraph is sought:

"If the commission had not stated its findings that the evidence did not warrant the removal of the patrolman and had referred the case back to the Police Commissioner for the exercise of his power of suspension, the record might have been sustained."

That part of the commission's record which assumed the jurisdiction to refer the charges back to the Commissioner of Police with directions to impose a fine upon the patrolman for what the commission indicated to be a violation of sections 5 and 8 of police department rules, could not be sustained, for the commission has no such jurisdiction; nor has the head of a department any jurisdiction to carry out such direction of the Civil Service Commission. In this case, therefore, the imposing of a fine upon the direction of the Civil Service Commission was without authority of law, and the record of the commission to that extent had to be quashed.

In further explanation of our letter we deem it appropriate to set forth briefly the limited powers vested in the Civil Service Commission and the department head. The commission is a quasi-judicial body, an arm of the executive branch of the government, and has only such powers as are conferred upon it by the Civil Service act. The jurisdiction of the commission in the matter of charges against those in the civil service are to be found in section 12 of the act.

That power is limited to sustaining the charges and removing the employee or not sustaining the charges and dismissing the same. There is no power in the commission to suspend or to impose a fine or to direct the department heads to resort to such disciplinary measures. It will also be observed that said section 12 recognizes as existing in the heads of departments the exclusive power to suspend for any period not exceeding thirty days. Even this power to suspend does not carry with it any power to

impose fines. The power to suspend is exclusively that of the department head, and may or may not be exercised as the head of the department sees fit, and is not subject to any direction in its exercise by the Civil Service Commission. This power to suspend is expressly taken out of the operation of the Civil Service act by the following language of section 12 thereof, viz:

· "Nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days."

This power of suspension is fully considered by the Supreme Court in the case of *Thomas v. City of Chicago, et al.*, 273 Ill. 479. The power applies not only to suspension from service but also from salary during the period of suspension.

It is therefore not necessary, as your letter implies, for the department head to submit for determination to the commission by way of written charges or otherwise the question whether the employee shall be punished or not by suspension. The department head must determine this for himself and exercise the power of suspension (not fine) without any regard to the commission or its powers. Thus, all matters of minor discipline of civil service employees rest exclusively with the head of the department, leaving the Civil Service Commission to be concerned only with the power to discharge upon a hearing conducted by them under section 12 of the Civil Service act.

How and upon what investigations or evidence the department head may act to suspend must be for such department head to determine himself and requires no official functioning by the Civil Service Commission.

EMERGENCY APPOINTMENTS BY CIVIL SERVICE COMMISSION

(No. 6915—*Civil Service Commission—F. J. V.—May 25, 1931—2 pp.*)

Whether an emergency exists which justifies a temporary appointment is a matter exclusively for the Civil Service Commission to determine.

Citation:

Statute: Civil Service act, sec. 10.

MINUTES OF CIVIL SERVICE COMMISSION.

(No. 6953—*Civil Service Commission—F. J. V.—June 15, 1931—1½ pp.*)

Minutes can be taken only of the action of the Civil Service Commission. Events which occur in the period between Civil Service Commission meetings enter into the minutes only as they are officially acted upon by the Civil Service Commission at its meeting.

SENIORITY—POLICY STATEMENT OF CIVIL SERVICE COMMISSION*

(No. 7704—*President, Civil Service Commission—F. J. V.—August 9, 1932—6 pp.*)

Whenever the City Council fails to appropriate for a civil service position in one department which position of like rank also occurs in other departments, the employment of the employee who was last certified to that position in any department is abolished and not the employment of the employee in the department for which no appropriation was made.

If, instead of abolishing positions in a group of positions of like rank and grade, as above, a single position, of a special and limited character of service in which but one person is employed, is abolished by a failure to appropriate therefor, seniority, does not apply, as above, and a place on the reinstatement list is all that such employee may expect.

The Civil Service Commission can not bind itself to a written statement of policy nor allow such a statement to affect its administrative duties and functions or the rights of those in the classified service. Neither can such a statement bind the subsequent administrative conduct of future commissions or members.

Citations:

Administrative rule: Civil Service Commission, Rule IX, sec. 1.
Other reference: 16 Op. Corp. Counsel 290.

ALTERATION OF CIVIL SERVICE COMMISSION'S AND CITY CLERK'S ACTS AND RECORDS

(No. 6746—*City Collector—August 7, 1930—F. J. V.—5½ pp.*)

The City Collector and the Civil Service Commission are without authority to rescind their past official acts designating the absence of a civil service employee adjudged insane as "a leave of absence," nor may they alter their records to show a "resignation" of that employee as of the prior date upon a petition tendered by the conservatrix.

Citations:

Administrative rule: Civil Service Commission, Rule VIII, sec. 3.
Cases: Hittell v. Chicago, 327 Ill. 443 (1928).
O'Connor v. Chicago, 327 Ill. 586 (1928).
People v. Chicago, 283 Ill. 462 (1918).
Other reference: 17 Op. Corp. Counsel 577.

*See also pp. 201, 202 for opinions on seniority rights.

SUIT AGAINST CIVIL SERVICE COMMISSION PRESIDENT

(No. 7956—*President, Civil Service Commission—F. J. V.—February 24, 1933—1½ pp.*)

Where the president of the Civil Service Commission is made a party defendant solely in his capacity as an officer of the city, he is not liable in his personal capacity for any costs of the lawsuit, but the city is liable for such costs.

Where court costs are a result of the public administration of the municipal government of the city, the city has the obligation to pay such costs.

(2) Rights and Obligations of Civil Servants*

Purpose of Civil Service: The main purpose of the Civil Service act is to procure improvement in the civil service and the protection of the civil servants in their tenure of office or employment is collateral to the main purpose.—*People v. Collins*, 276 Ill. App. 1 (1934).

POLITICAL AGITATION BY EMPLOYEES

(No. 8201—*Commissioner of Public Works—Q. O'B.—November 3, 1933—2½ pp.*)

A civil service employee who organizes and promotes an organization for political agitation and action and solicits the membership of other civil service employees, is violating the Civil Service act.

Citations:

Statute: Cah. '31, 24: 706, 707.

Case: *People v. Murray*, 307 Ill. 349, 355 (1923).

POLITICAL PARTICIPATION BY EMPLOYEES

(No. 6832—*Civil Service Commission—E. C. H., F. J. V., C. J. A.—February 3, 1931—6½ pp.*)

The Civil Service act does not prohibit a civil service employee from participating in a political campaign or from fulfilling the duties of his citizenship by lending his aid and effort in support of principles which he believes to be right or candidates for office whom he regards as the best qualified.

Citation:

Statute: SH '29, 24½: 60-67.

*See Opinion No. 7028, p. 180, on citizenship qualifications for civil service.

SENIORITY RIGHTS—SEPARATION FROM POSITION*

(No. 6973—*Civil Service Commission—F. J. V.—June 26, 1930—8 pp.*)

Seniority in the service and not the last certification determines the relative rights of persons in the same line of civil service in matters of promotion, demotion, and layoff.

Seniority dates from the employee's first original examination for any position classified in the same general class or grade by the Civil Service Commission.

A person is permanently separated from a position only when that person accepts certification to a position which appears on a different register, and which is not of the same class or grade of service as the position relinquished.

The status of a person who has been permanently separated from the civil service is the same as if such person had never entered the service.

Citations:

- | | |
|------------------------------|--|
| Statute: | Civil Service act, secs. 8, 9. |
| Administrative rules: | Civil Service Commission, Rule I, sec. 3; Rule IV, secs. 2, 3, 5; Rule V, secs. 1, 3; Rule IX, secs. 1, 3. |
| Case: | Thomas v. Chicago, 273 Ill. 479 (1916). |
| Other references: | Opinion No. 6621 (this volume, p. 190).
16 Op. Corp. Counsel 290. |

CHANGE IN TITLE OF POSITION

(No. 7654—*Commissioner of Public Works—F. J. V.—July 18, 1932—2 pp.*)

Where the titles of certain employees were changed in an annual appropriation bill, the Civil Service Commission must reclassify such positions if it decides that the City Council has redefined the service in connection with the change of title or the department has changed or modified the work of the position.

Citation:

- Administrative rule:** Civil Service Commission, Rule 1, secs. 7, 8.

ENTRY TO CIVIL SERVICE BY RECLASSIFICATION

(No. 6617—*Civil Service Commission—F. J. V.—March 8, 1930—1½ pp.*)

The bus attendants of the Board of Education, in order to enter the general classified civil service, must have their position defined by the City Council as a position or place of employment in service other

*See also pp. 200, 201 for opinions on seniority rights.

than common labor. Or if this already sufficiently appears, the Civil Service Commission should reclassify the position of attendant so as to take it out of the non-competitive service, by defining it, placing it in some general line of public service as an original promotional position, and providing for the proper civil service examination.

CIVIL SERVICE STATUS OF CHIEF FIRE MARSHAL

(No. 6435—*Civil Service Commission—F. J. V.—May 13, 1929—2½ pp.*)

The office of Chief Fire Marshal is a civil service position which must be classified by the Civil Service Commission and filled by certification and appointment.

Citations:

Ordinance: Code '22: ch. XXIX as amended, Coun. J. (1924-25), p. 3075 and Coun. J. (1927-29), p. 1905.

Statute: Civil Service act, sec. 11.

Cases: *People v. Kipley*, 171 Ill. 44 (1897-98).

People v. Loeffler, 175 Ill. 585 (1898).

People v. Roderick, 283 Ill. 462 (1918).

People v. Finn, 241 Ill. App. 621 (1926).

Note: The office of Fire Commissioner as head of the Fire Department was abolished by ordinance on December 12, 1934 (Coun. J., 1934-35, p. 3139), and since then through the current year, 1936, the Chief Fire Marshal has performed the functions of department head. Department heads are excluded from the civil service.

B. ENTERING THE SERVICE

(1) *Examinations and Eligible Lists**

CANCELLATION OF ELIGIBILITY LIST

(No. 8821—*Civil Service Commission—Q. O'B.—July 19, 1935—4½ pp.*)

The Civil Service Commission has the right, and should without delay cancel an eligible list for firemen, which has been posted for five years, without filling existing vacancies, and despite the pendency of suits to enforce the certification of certain eligibles who are on the list.

The purpose of cancelling old civil service lists is to obviate the danger of certifying candidates who have become unfit since their examination.

Citations:

Statute: Cah. '31, 24: 694.

Cases: *People v. Lynch*, 271 Ill. App. 360 (1933).

People v. Chicago, 279 Ill. App. 624 (1935).

(The original opinion of the foregoing synopsis is reproduced on the following pages.)

*See Opinion No. 6992, p. 192, on dividing eligible lists into two separate lists.

OPINION OF FOREGOING SYNOPSIS

Complying with your request for an opinion as to the right of the Civil Service Commission, under the law, to cancel the eligible list for firemen of the Chicago Fire Department which has been posted for nearly five years last past, without filling possible vacancies now existing, and notwithstanding the pendency of certain lawsuits seeking to enforce the certification of certain eligibles whose names are on said list, we submit the following:

During the period of the economic depression the City of Chicago, like many other municipalities, for financial reasons has found it necessary to make retrenchments, not only by deductions from the appropriated salaries of its employees, but by leaving positions vacant although appropriated for whenever in the judgment of the department head the efficiency of his department will not be impaired thereby.

This policy of economy and retrenchment has been questioned and attacked by suits in the courts of Illinois and elsewhere and it has been justified by decisions of the supreme courts of many states and those of the Federal Court, including the United States Supreme Court.

Some of these suits have challenged the right of a Civil Service Commission to cancel a stale eligible list of eligibles for a classified civil service position without first filling vacancies which then existed in said position.

The first attack of this kind made in our state was in the case of *People ex rel. Michael Lynch v. City of Chicago*, reported in Vol. 271 Ill. App. 360. In that case Mr. Lynch secured a writ of mandamus in the lower court commanding the Civil Service Commissioners to forthwith certify from the eligible list posted December 24, 1924, his name for the position of sergeant of police. It appeared therein that said list was cancelled on January 2, 1930, more than two years after it was posted and before Mr. Lynch filed his suit, but while vacancies existed to which Mr. Lynch was eligible and for which he was demanding certification at the time and prior to the cancellation.

Our office appealed this case to the Appellate Court, which reversed the judgment of the lower court in an opinion written by Mr. Justice Gridley, who justified the commission in cancelling the list because the statute creating the commission and granting it power, in sec. 10 of the act (Cahill's Statute, chap. 24, par. 694), contains the following provision:

"Said commission may strike off names of candidates from the register after they have remained thereon more than two years."

The court also held that—

"* * * When said old eligible list was cancelled it became *functus officio*, that is, it 'had become of no virtue whatsoever' (2 Bouvier's Dict., Rawle's 3rd ed., p. 1323), and petitioner's name, not being on any list, could not legally be certified by the commission for the position of sergeant."

This question arose again in the case of *People ex rel. William F. Jahn v. City of Chicago*, Edward J. Kelly et al. decided by the Illinois Appellate Court, First District, February 13, 1935.

Mr. Jahn, a lieutenant in the Fire Department had successfully passed a promotional examination for the position of captain in said department on August 30, 1929, and his name on April 14, 1931, was No. 1 on the eligible list for said position. At that time there were three vacancies in the position of captain. He made demands that he be certified then, and renewed his demands from time to time. The Fire Commissioner, pursuant to the policy of retrenchment and economy, saw fit to leave these positions vacant and have their functions performed by lieutenants who were acting captains on the pay of lieutenants. On September 3, 1931, the Civil Service

Commissioners of the City of Chicago cancelled the eligible list for the position of captain in the Fire Department without filling either of these three vacancies, notwithstanding the demands of Mr. Jahn's that he be certified to fill one of the vacancies.

Judge James J. Kelly, of the Superior Court, after a full hearing on the law and facts justified the action of the Civil Service Commission and ordered the suit dismissed on our motion as attorneys for the Mayor, the Civil Service Commission and the Fire Commissioner. Mr. Jahn, through his attorneys, appealed this case to the Appellate Court of Illinois, First District, which approved and affirmed the opinion of Judge Kelly, and their opinion delivered by Mr. Justice Wilson quoted, with approval, the aforesaid opinion in the Michael Lynch case and said:

"We agree with the views expressed in that opinion. The fact that there was a vacancy at the time the list was cancelled, in our opinion, does not vitiate the right of the Civil Service Commission to cancel the list and to require a new examination. There may have been very good reasons for not filling the vacancy. It may have been for financial reasons and the desire to make retrenchments in the cost of government. The matter of cancellation was one within the power of the Civil Service Commission and we will not interfere with the discretionary right of the Civil Service Commission to take such action."

Later Mr. Jahn's attorney petitioned the Supreme Court of Illinois for leave to appeal from this judgment, seeking its reversal. The opinion and all of the facts and legal points were presented to the Supreme Court in written briefs by his attorney and by our office. The Supreme Court after an examination of said opinion and briefs denied the appeal on June 19, 1935, thereby approving of the opinion of the decision of the Appellate Court.

We have examined the civil service laws of various states and the decisions of their supreme courts interpreting the same. The laws of many of these states carry the provision that the Civil Service Commission has the power to cancel an eligible list after it has been posted for two years. Some of the states make it compulsory on the commission to do so, and in some the statute declares that the list automatically expires at the end of two years.

The purpose seems to be to avoid stale lists and obviate the danger of certifying candidates who, by lapse of time, by sickness, accidents, and other causes may have become unfit since their examinations. This is especially true in lists for the position of firemen and policemen where the physical fitness and health are so important and where age limits are involved.

We are, therefore, of the opinion that the Civil Service Commission has the right and power to cancel said eligible list for firemen and since it has been posted for nearly five years we are also of the opinion, for the reasons heretofore set forth, that it should be cancelled without further delay, notwithstanding that there are still pending a few suits in which candidates whose names are on said list are seeking certification.

RESTORATION OF CANCELLED SERVICE LIST

(No. 6431—*F. J. V.*—May 7, 1929—2 pp.)

A cancelled civil service list cannot legally be restored, and an examination should be held to create a new list of eligibles.

Citation:

Reference: 17 Op. Corp. Counsel 126.

APPOINTMENTS WHEN ELIGIBILITY LIST EXISTS*

(No. 6862—*Deputy Comptroller—F. J. V.—April 11, 1931—2 pp.*)

Where there is a legal eligible list, appointments to a position must be made therefrom and any appointment of temporaries to such position is illegal and no salary should be paid to such illegally employed temporaries. When the violation of this law is enjoined by a court, the violator is liable to punishment for contempt of court.

CIVIL SERVICE EXAMINATION WHEN LEGAL PROCEEDINGS PENDING—PRIORITY RIGHTS OF SCHOOL TUBERCULOSIS PHYSICIANS

(No. 6714—*Civil Service Commission—F. J. V.—July 10, 1930—3 pp.*)

Existing injunctive or mandamus proceedings do not affect in any manner the duty of the Civil Service Commission to hold an examination to create an eligible list for filling vacancies.

School tuberculosis physicians whose office has been abolished are entitled to precedence in certification and appointment to fill existing vacancies of the same type of service.

Citations:

Administrative rule: Civil Service Commission, Rule I, sec. 3.

Cases: People v. Chicago, 283 Ill. 462 (1918).

People v. Finn, 241 Ill. App. 621 (1926).

Civil Service Examination: The commission is to cause an applicant who is eligible for appointment and whose name is on the register, but who is not appointed within sixty days of his physical examination to take a second examination and if the result is below the minimum standard, he is not to be appointed. His name is to be retained on the register and when again reached, he is to be examined a third time, and if found to be below the minimum standard, he is to be dropped from the list.—Ill. Laws (1931), p. 383.

CITY COUNCIL'S POWER OVER PREFERENCES

(No. 8205—*Alderman, 45th Ward—M. H. F.—November 6, 1933—1½ pp.*)

An order of the City Council which directs the Civil Service Commission to show consideration in marking the examination papers of sons of policemen and firemen is beyond the power of the City Council.

The only preference authorized by the Civil Service act is that which is to be given to those who were engaged in the military or naval service of the United States during certain designated years and were honorably discharged.

Citation:

Statute: SH '33, 24½: 49.

*See also pp. 181-183 and Opinion No. 6915, p. 171, on temporary appointments.

(2) *Appointments*

FILLING CIVIL SERVICE VACANCIES

(No. 6858—*Acting Commissioner of Police—F. J. V.—March 31, 1931—2½ pp.*)

A civil service position may be filled only by making a requisition to the Civil Service Commission, informing them of the existence of a vacancy and requesting the certification of a civil service eligible for the appointment thereto.

The Civil Service Commission cannot determine the existence of a vacancy in any department of the service, nor initiate the filling of an existing vacancy, nor require or compel any department head or officer to fill any position.

The notification of vacancies to be filled and the certification of civil service eligibles should be made separately for each position.

Citations:

Statute: Civil Service act, sec. 10.

Case: *People v. Chicago*, 285 Ill. 462, 465 (1919).

OPINION OF FOREGOING SYNOPSIS

In your communication of March 25, 1931, you state that "the names of the following have been certified to me by the Civil Service Commission for appointment as janitors although I have made no requisition for such certification. Will you kindly advise me if, in your opinion, these should be appointed." (Names omitted.)

The power to appoint to civil service positions is primarily in the heads of departments; not in the Civil Service Commission. Section 10 of the Civil Service act itself specifically provides the method by which positions in the classified civil service shall be filled. * * *

The Supreme Court in the case of *People ex rel. Roderick v. City of Chicago*, 283 Ill. 462 on page 465, in sustaining the action of mandamus against the department head to fill a vacancy in a civil service position, said:

"The City Civil Service act provides in section 3 that no appointment shall be made in the classified civil service of the city except according to the provisions of that act. Section 10 provides that the head of a department or office in which a position in the classified service is to be filled shall notify the commission, that the commission shall certify to the appointing officer the candidates standing highest on the eligible list, and that the appointing officer shall fill the place by the appointment of the person so certified. * * * If a vacancy exists in the position of superintendent of machinery it was the duty of the fire marshal to notify the commission of the fact and the duty of the commission to certify the name of petitioner, *People v. Kipley*, 171 Ill. 44."

We are of the opinion that a civil service position may be filled in compliance with the law only upon a requisition first made to the Civil Service Commission, informing them of the existence of vacancy and requesting certification of a civil service eligible for appointment thereto. It is not for the Civil Service Commission to determine the existence of a vacancy in any department of the service nor to initiate the filling of any existing vacancy.

It is not within the power of the Civil Service Commission to require or compel any department head or officer to fill any position, furthermore, it is not a proper certification to send to the appointing officer the names of four or five persons for appointment, for this is in violation of section 10 which provides that: "the appointing officer shall notify said Commission of each position to be filled separately, and to fill such place by the appointment of the person certified to him." That the appointment in this case is irregular plainly appears from lack of any requisition by the head of the department upon the Commission to certify, and by the gratuitous certification of five men at one time where only one may be certified.

CITIZENSHIP QUALIFICATIONS FOR CIVIL SERVICE EMPLOYMENT

(No. 7028—*Acting General Superintendent, Municipal Tuberculosis Sanitarium—F. J. V.—July 25, 1931—2½ pp.*)

United States citizenship is a requisite for employment, regular or temporary, in the civil service.

An employee or officer in the classified civil service must not only maintain a bona fide actual place of abode in the city, but such place of abode must also be his legal domicile.

Citations:

Ordinance: Code '22: 2825.

Statute: Civil Service act, sec. 6.

Cases: *People v. Platt*, 117 N. Y. 159, 22 N. E. 937 (1889).

People v. Kirkpatrick, 164 Ill. App. 328, 330 (1912).

Opinion No. 6483 of August 2, 1929 to the Acting Fire Commissioner is in accord with the above opinion.

RIGHT TO QUESTION CIVIL SERVICE APPOINTMENTS

(No. 6965—*Commissioner of Public Works—F. J. V.—June 20, 1931—1½ pp.*)

The only person who may attack the legality of the appointment of a civil service employee is the civil service eligible whose rights were violated by the appointment.

Citation:

Case: *People v. Errant*, 229 Ill. 56 (1907).

STATUS OF VACATIONING EMPLOYEE'S POSITION

(No. 6743—*General Superintendent, Municipal Tuberculosis Sanitarium—F. J. V.—August 4, 1930—2 pp.*)

No vacancy exists in the position of a civil service employee who is on a regular vacation. Hence, the Civil Service Commission or the

department head has no power to certify another civil service eligible to that position.

Citation:

Administrative rule: Civil Service Commission, Rule VIII, sec. 4.

**TEMPORARY APPOINTMENT WHEN ELIGIBILITY LIST
EXISTS***

(No. 6476—*Commissioner of Gas and Electricity—F. J. V.—July 23, 1929—2 pp.*)

The department heads of the city may not appoint temporary workers where there exists a list of civil service eligibles for the position, even when the Civil Service Commission fails to act promptly on the requisitions for employees.

Citation:

Statute: Civil Service act, sec. 10.

TEMPORARY APPOINTMENTS FOR VACATION RELIEF

(No. 6747—*Commissioner of Public Works—F. J. V.—August 8, 1930—1½ pp.*)

City officials would not be cited for contempt of court when making temporary appointments for vacation relief, since that action does not violate the injunction restraining heads of the departments from appointing any temporary employees where there are civil service eligibles for those positions.

Citation:

Reference: Opinion No. 6743 (this volume, p. 180).

**FILLING VACATED POSITION OF FIREMAN ON DISABILITY
PENSION**

(No. 6550—*Fire Commissioner—F. J. V.—November 25, 1929—2 pp.*)

A position, vacated by a formerly active fireman to go on disability pension, can only be filled by a temporary appointee, and the position must be returned to its former holder as soon as he recovers from his disability and is ordered restored to active service.

Citation:

Reference: 16 Op. Corp. Counsel 90.

*See also Opinion No. 6826, p. 177, Opinion No. 6915, p. 171, and Opinion No. 6221, p. 190.

**TEMPORARY APPOINTEE AS CIVIL SERVICE ELIGIBLE—
DISCHARGE FOR LACK OF WORK—REINSTATEMENT
LIST—WAIVER OF CERTIFICATION**

(No. 6810—*Civil Service Commission—F. J. V.—December 9, 1930—*
5½ pp.)

A temporary appointee who remains in service after becoming a civil service eligible must be certified by the Civil Service Commission, but his civil service status becomes fixed whether he is so certified or not.

A civil service employee who is discharged due to the lack of work should be placed on the reinstatement list and, in law he is to be treated as having been on the list from the date of his discharge.

A reinstatement list may not be cancelled nor can it expire except by a certification of the last name appearing on it.

A waiver of certification cancels itself when the person next on the eligibility list is certified and appointed to the position for which certification is waived.

Citations:

Statute:	Civil Service act, secs. 10, 12.
Administrative rule:	Civil Service Commission, Rule IV, sec. 4.
Case:	People v. Coffin, 282 Ill. 599 (1918).
Other references:	Opinion No. 6464 (this volume, p. 183).
	Opinion No. 6625 (this volume, p. 182).
	17 Op. Corp. Counsel, p. 126.

**RIGHTS OF TEMPORARY WHO BECOMES CIVIL SERVICE
EMPLOYEE**

(No. 6625—*Civil Service Commission—F. J. V.—March 20, 1930—*
3 pp.)

A temporary employee, who by examination becomes a regular civil service employee entitled to certification and appointment, has the right to be certified and appointed to the position he has been holding as a temporary appointee, instead of to some other position.

Citations:

Case: People v. Sprague, 241 Ill. App. 606 (1926).
Other reference: Opinion No. 6464 (this volume, p. 183).

CERTIFICATION OF EMPLOYEES CONTINUING AS TEMPORARIES

(No. 6464—*Commissioner of Police—F. J. V.—July 9, 1929—4 pp.*)

The Civil Service Commission must certify persons to fill vacant positions when an eligible list exists from which the positions can be filled.

The Civil Service Commission cannot exact a waiver of certification to a position from persons continuing as temporary appointees in other positions of the same classification, since, if the eligible list exists, certification for the latter positions should also be made.

The Civil Service Commission cannot deprive civil service employees continuing as temporary appointees of their rightful places on the eligible list, and they can be replaced only by the certification of men appearing higher on the eligible list.

Citations:

Statute: Civil Service act, sec. 10.

Cases: *People v. Chicago*, 283 Ill. 462 (1918).
People v. Finn, 241 Ill. App. 621 (1926).

ELIGIBLE'S RIGHT TO FULL-TIME APPOINTMENT

(No. 6930—*Director, Municipal Tuberculosis Sanitarium—B. J. K.—June 4, 1931—1½ pp.*)

A part-time employee of the Municipal Tuberculosis Sanitarium who is a civil service eligible, should be certified and appointed, in the place of a temporary employee, to a full-time vacancy.

CONTROL OVER POUNDMASTER'S CERTIFICATION

(No. 7157—*Mayor—J. F. G.—September 29, 1931—2½ pp.*)

The office of poundmaster is in the classified civil service of the city, and the Civil Service Commission can not be governed or influenced by any outside organization in certifying to the Commissioner of Police the name of a person to appointment under the civil service law, and a provision that the poundmaster be recommended by a humane society is invalid.

Citation:

Ordinance: Coun. J. (1931-32), p. 783 (Ordinance establishing animal care section of the Police Department, sec. 3).

FILLING POSITION OF DISABLED SUPERINTENDENT OF STREETS

(No. 6420—*Commissioner of Public Works—F. J. V.—April 29, 1929—2 pp.*)

The position left by the Superintendent of Streets, who is entirely incapacitated and is receiving a disability pension, should not be filled by the Deputy Superintendent, but should be regarded as vacant for an indefinite period and, therefore, to be filled in accordance with the Civil Service act.

In the absence of a list of eligibles, authority may be lawfully granted to fill the position by a temporary appointment for such reasonable time as may bring about the recovery of the superintendent.

Citations:

Ordinance: Code '22: 3234-38.

Case: Rohm v. Finn, 236 Ill. App. 613 (1924-25).

(3) Veterans' Preference

FAILING TO ASSERT VETERANS' PREFERENCE

(No. 7761—*Civil Service Commission—F. J. V.—September 29, 1932—3½ pp.*)

The right of preference to veterans is unconditional and cannot be rendered void by any rule of the Civil Service Commission.

Failure to assert the right does not bar a veteran's right to preference.

Citation:

Statute: Civil Service act, sec. 10½.

Administrative rule: Civil Service Commission, Rule III, sec. 4; Rule V, sec. 5.

VETERANS' RIGHT TO HEAD LIST

(No. 6925—*Civil Service Commission—F. J. V.—June 2, 1931—1½ pp.*)

It is mandatory upon the Civil Service Commission to place at the head of the list of eligibles certified for appointment every soldier or sailor applicant who is entitled to it.

Citation:

Statute: Civil Service act, sec. 10½.

CIVIL SERVICE COMMISSION'S POWER OVER VETERANS' PREFERENCE

(No. 6986—*Acting Commissioner of Police—F. J. V.—July 5, 1931—2½ pp.*)

The Civil Service Commission has no power to enlarge or diminish the preference of veterans.

Citation:

Statute: Civil Service act, secs. 6, 10½.

CIVIL SERVICE COMMISSION'S POWER OVER VETERANS' PREFERENCE

(No. 7459—*Civil Service Commission—F. J. V.—February 24, 1932—2 pp.*)

The Civil Service Commission has no power to make any rule that subjects the preference of veterans to any conditions. This right, being absolute and continuing, may be asserted at any time.

Citations:

Statute: Civil Service act, sec. 10½.

Mandamus for Veterans' Preference: In a mandamus proceeding to compel the Civil Service Commission to place petitioners, who were war veterans, in advanced positions on the list of eligibles certified for appointment, laches is available as a defense.—*People v. Collins*, 276 Ill., App. 1 (1934).

POWER OVER VETERANS' PLACE ON ELIGIBLE LIST

(No. 7422—*Commissioner of Public Works—F. J. V.—January 18, 1932—1½ pp.*)

The Civil Service Commission must accept war veterans' certificates of honorable discharge and give those veterans preference at the head of the eligible lists. Department heads are not obliged, nor have they power, to rectify the failure of the Civil Service Commission to give the veterans their preference.

Citation:

Statute: Civil Service act, sec. 10½.

PERSONS ENTITLED TO VETERANS' PREFERENCE[®]

(No. 8824—*Civil Service Commission—F. J. V.—July 20, 1935—2 pp.*)

Military preference in appointments and promotional credits should be given to those who are honorably discharged from military or naval service, for serving in the years 1861, 1862, 1863, 1864, 1865, 1898,

1899, 1900, 1901, 1902, 1914, 1915, 1916, 1917, 1918, or 1919 and for service in any of these years and also now or hereafter on inactive or reserve duty in military or naval service.

Citation:

Statute: Civil Service act, sec. 10½.

DISCHARGE FROM DRAFT FOR VETERANS' PREFERENCE

(No. 6506—*President, Civil Service Commission—M. H. F.—September 11, 1929—3½ pp.*)

In determining veterans' preference, a discharge from the draft under honorable condition is equivalent to an honorable discharge from United States military service within the purview of the Civil Service law.

Citations:

Statutes: Cah. '29: ch. 24, p. 457 (Civil Service act, sec. 10½).
32 US Stat. 629.

Other reference: Digest of the Opinions of the Judge Advocate General, U. S. Army (1919), p. 136.

VETERANS' PREFERENCE FOR RED CROSS WORKERS

(No. 7054—*Civil Service Commission—F. J. V.—August 3, 1931—2 pp.*)

Persons who served in the American Red Cross during the World War should be given military preference in civil service appointments.

Citations:

Statute: Civil Service act, sec. 10½.

Other reference: Op. State's Atty., Oct. 29, 1919, to Cook County Civil Service Commission.

FAILURE TO SEEK VETERANS' PREFERENCE

(No. 6653—*F. J. V.—April 25, 1930—1½ pp.*)

The Civil Service Commission cannot be compelled to give military credit after the eligible list has been posted when a person has failed to seek that credit before the posting of the list.

Citation:

Statute: Civil Service act, sec. 10½.

Opinion No. 6649 of April 23, 1930, is in accord with the above opinion.

NON-VETERANS' PLACE ON LIST PENDING APPEAL

(No. 7913—Civil Service Commission—F. J. V.—January 24, 1933—3 pp.)

Pending an appeal from a decision of the trial court giving veteran caulkers a preference over non-veterans, the positions of the non-veterans on the civil service list should be maintained in a *status quo* until the final decision in the highest court and the writ of mandamus directed to the commission has been issued.

Citation:

Statute: Civil Service act, sec. 6.

C. TRANSFERS AND PROMOTIONS**LAYOFF BASED ON TRANSFERRED EMPLOYEES' SALARY DEMANDS—SENIORITY CREDITS ON TRANSFER**

(No. 6684—Civil Service Commission—F. J. V.—May 29, 1930—6 pp.)

A layoff for lack of funds cannot legally be based on the demand of certain employees who have been transferred from one service to another, to a salary that is higher than the one that the new position provides. Civil service employees transferred from one service to another have a right only to such compensation for the new position as was paid at the time of transfer.

A transfer of civil service employees from one service to another does not waive or change their existing seniority rights.

Citations:

Administrative rule: Civil Service Commission, Rule VIII, sec. 4; Rule IX, sec. 3.

Cases: People v. Kipley, 171 Ill. 44 (1897-98).

People v. Chicago, 337 Ill. 10 (1930).

Other reference: Opinion No. 6621 (this volume, p. 190).

OPINION OF FOREGOING SYNOPSIS

We have your request of the 27th inst., for an opinion in the matter of the proposed layoff of one of the fourteen school tuberculosis nurses certified to the Municipal Tuberculosis Sanitarium to fill fourteen vacancies then existing in that institution. This certification was made by the Commission pursuant to an opinion of this office of date March 12, 1930. It does not seem quite clear from your communication why there should be an immediate layoff of one of these nurses. We are informed, however, that this layoff is necessitated by a demand of some of these nurses who were transferred to the sanitarium from a reinstatement list where they were placed by reason of the City Council's failure to make appropriation for their positions as field nurses in the Health Department of the City of Chicago—a demand for so-called "maximum salary." This demand, we are informed, is about to be met by the Board of Trustees of the Tuberculosis Sanitarium

upon a threat of mandamus against such board if it does not accede to such demand.

Your communication assumes that this layoff must be made and you inquire who of this number of certified nurses should be laid off, considering seniority rights. It is our opinion that the question here presented is not who shall be laid off but whether any layoff at all may be made in the situation as it now exists.

Not only has a formal demand been made upon the sanitarium officials for the payments to some of these nurses of what they call "maximum salary," with a threat of mandamus to enforce that demand, but formal written demand has been made upon you to reinstate one of these nurses to the place for which she was just certified and appointed by the sanitarium, with a like threat to bring a mandamus and personal action to enforce her demands.

It is, therefore, not a question in this case of who shall be laid off but whether any layoffs may be legally made. We are of the opinion that the demand of the nurses or any of them who have been certified and appointed to these positions in the Tuberculosis Sanitarium on the strength of our opinion of May 12, 1930, is wholly without legal support or warrant. At the time of their transfer, on the strength of the opinion in their behalf, they were on the reinstatement list without positions and without any salary whatever. Their transfer did not carry with it any right whatever to any "maximum salary" but to "*approximate pay*" as the new position carried with it at the time in the Tuberculosis Sanitarium. This clearly appears, from the express provision of section 3, rule IX of the Civil Service Commission. * * *

The fourteen nurses whose layoff is considered, were transferred to the vacant positions in the Tuberculosis Sanitarium *for the benefit of the public service*, and not out of any consideration of their personal rights to salary. The fact is that no civil service employee has any absolute right to any salary, nor indeed any property right in any civil service position. This is clearly established by the Supreme Court in the case of the People v. Kipley, 171 Ill. 44. * * *

In a recent case successfully prosecuted by us, the case of People ex rel., Reilly v. City of Chicago, 337 Ill. 100, the Supreme Court had this to say on the subject of property in the salary and emoluments of public office:

"Labor has been held to be property. (Ritchie v. People, 155 Ill. 98.) It does not follow, however, that appellant has a property right in the position which he has occupied as electric light laborer. One has no property right in an unearned salary (Hughes v. Traeger, 264 Ill. 612). Positions or places held under the Civil Service act is not property. The right of compensation grows out of the rendition of service and not out of any contractual relation (Gathman v. City of Chicago, 263 Ill. 292; People v. City of Chicago, 242 Id. 561; People v. Loeffler, 175 Id. 585; People v. Kipley, 171 Id. 44)."

It is obvious from the authorities here cited, that those nurses just transferred from the school tuberculosis service to the service of the Municipal Tuberculosis Sanitarium, have no right whatever to any so-called "maximum salary" or to any other specified compensation for their service in the new position, except such as existed in the sanitarium at the time they accepted such transfer to their work in the new field. It is therefore equally apparent that the trustees of the sanitarium have no legal power or authority whatever to lessen the number of the fourteen certified to them for the fourteen vacancies then existing in order that they might meet the illegal and unwarranted demand of some of these transferees for an arbitrary and so-called "maximum salary." To do so would be an actual violation of the equal right of the nurse now sought to be laid off, to her position at the existing salary at the time of her transfer.

* * * * *

CIVIL SERVICE COMMISSION'S POWER TO TRANSFER— CHANGE OF TITLE OF SENIOR STATISTICAL CLERK

(No. 7312—*Civil Service Commission*—*F. J. V.*—November 21, 1931—
3½ pp.)

The Civil Service Commission is without authority to transfer an employee from a classified position for which he has qualified to another from which he has not qualified under the Civil Service act.

The Civil Service Commission has no power to allow a change of title of the position of senior statistical clerk to that of senior clerk.

Citations:

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|----------------------|--|
| Statute: | Civil Service act, secs. 3, 6, 8, 10. |
| Administrative rule: | Civil Service Commission, Rule IX, sec. 3 ("Lay-offs" and "Reinstatements"). |
| Case: | People v. Coughlin, 282 Ill. 599, 610 (1918). |
| Other reference: | Opinion No. 6621 (this volume, p. 190). |

Transfer to Inferior Position: The executive officers of the Board of Health abused their discretion in assigning a supervising field nurse, who had previously qualified under the Civil Service act, to duties inferior to those of her classified position and put in her place two appointees who had not so qualified. Such action is reviewable by the courts and mandamus will lie to restore the employee.—*People v. Bundesen*, 277 Ill. App. 169 (1934).

TRANSFER BY DEPARTMENT HEADS—POWER TO CREATE AND CLASSIFY POSITIONS

(No. 6683—*Commissioner of Public Works*—*F. J. V.*—May 28, 1930—
5 pp.)

Civil service employees may insist upon their civil service contract right to fill a certain existing position, and there is no power in the head of the department to transfer them, without their written consent, to some other bureau or division of the department.

Only the City Council has power to create or establish positions and places of employment in the city service. Only the Civil Service Commission has power to classify those positions and places of employment according to the manner and purpose for which the Council established them.

Citations:

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|-------------|---|
| Ordinances: | Code '22, p. 887. |
| | Coun. J. (1929-30), pp. 2635, 2641-42. |
| Cases: | People v. Coffin, 82 Ill. 599 (1876). |
| | Chicago v. Luthardt, 191 Ill. 516 (1901). |

TRANSFER TO VACANCY IF POSITION ABOLISHED*

(No. 6621—*Civil Service Commission—F. J. V.—March 12, 1930—7 pp.*)

Tuberculosis nurses whose positions are abolished in any department or municipality of the city have the right to be certified and appointed to any vacant position of tuberculosis nurse in any other department or municipality of the city under the jurisdiction of the Civil Service Commission of Chicago.

The Civil Service Commission may not require tuberculosis nurses transferred from one department or municipality of the city to another department or municipality of the city to waive their seniority rights.

There is no warrant for creating separate lists of eligibles to positions in the same general line of service for separate departments or municipalities of the city, nor has the commission any power to divide the eligibles established by an original examination and place them on separate lists with different titles.

It is a direct violation of the Civil Service act to appoint to, and maintain in any civil service position any temporary or sixty-day appointee when there is a civil service eligible on any original or re-instatement list for that position.

Citations:

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| Ordinance: | Coun. J. (1929-30), p. 2300. |
| Statute: | Civil Service act, secs. 3, 4, 9. |
| Cases: | People v. Finn, 241 Ill. App. 621 (1926).
People v. Chicago, 283 Ill. 462 (1918). |
| Other reference: | 16 Op. Corp. Counsel 290. |

TRANSFER RIGHTS OF HOLDERS OF ABOLISHED POSITIONS

(No. 7238—*Civil Service Commission—F. J. V.—October 30, 1931—3½ pp.*)

Since the positions of probation officers had been abolished these former employees may be entitled to certification to the positions of truant officer, Board of Education, if the Civil Service Commission should decide that the positions of probation officer and truant officer are "of the same branch, class, grade or rank, and character of work and approximate pay."

Citations:

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|----------------------|--|
| Administrative rule: | Civil Service Commission, Rule IX, sec. 3. |
| Other reference: | Opinion Nos. 6621, 6691 (this volume, pp. 190, 202). |

*See also Opinion No. 6714, p. 178, and Opinion No. 6810, p. 182.

TRANSFER AND REASSIGNMENT OF LAID-OFF LABORERS

(No. 6690—*Commissioner of Public Works—F. J. V.—June 2, 1930—2½ pp.*)

Civil service street laborers should be transferred to the vacant positions of civil service laborers on repairs and civil service asphalt helpers when a layoff is necessary in the Bureau of Streets because of a lack of funds, as the layoff places these employees on the reinstatement list from which they are entitled to immediate certification and appointment to any vacant positions of the same branch, class, grade or rank, character of work, and approximate pay, according to their seniority of certification.

Laborers transferred due to a lack of funds should be reassigned back to their regular positions when conditions warrant.

Civil service laborers transferred to other positions of the same character, cannot displace those who are regularly certified to that work.

Citation:

Case: *People v. Ames*, 337 Ill. 100 (1930).

DETERMINATION OF RIGHT TO PROMOTION

(No. 6741—*Acting Commissioner of Police—F. J. V.—July 31, 1930—2½ pp.*)

Promotions in the classified service must be based on "ascertained merit and seniority in service and examination." That ascertained merit is derived from the efficiency marking made by department heads and recorded by the Civil Service Commission, and from such investigations as may be made by the commission itself.

Citations:

Statute: Civil Service act, secs. 4, 9.

Administrative rules: Civil Service Commission, Rule V, sec. 4; Rule XII.

POLICE PROMOTION AFTER LIST CANCELLED

(No. 8582—*Chairman, Committee on Police and Municipal Institutions—Q. O'B.—December 6, 1934—2 pp.*)

A police patrolman whose name appeared on a registry list of candidates for sergeant, which list has been cancelled by the Civil Service Commission, cannot be promoted to that position by a resolution of the City Council, despite reports of the patrolman's bravery.

Citation:

Case: *People v. Chicago*, 271 Ill. App. 370 (1933).

PROMOTIONAL EXAMINATION BY COURT ORDER—CREATION OF ELIGIBILITY LIST

(No. 6992—*Civil Service Commission—F. J. V.—July 8, 1931—5 pp.*)

Where a judgment of the Cook County Superior Court so orders, a promotional examination must be held for a position and those specified as eligible in the judgment are eligible to take the examination.

A civil service eligible list or register can not be created by dividing an already existing eligible list or register.

PROMOTION WHEN LEGAL PROCEEDINGS PENDING

(No. 8122—*Commissioner of Police and Civil Service Commission—F. J. V.—July 19, 1933—1½ pp.*)

Where a judgment ordering the promotion of ten patrolmen to the position of sergeant was reversed and an appeal is pending, the Civil Service Commission has no power to certify and the Police Commissioner has no power to appoint them to the position of sergeant until a valid judgment ordering such promotion is rendered and sustained.

PREFERENCES IN POLICEMEN'S AND FIREMEN'S PROMOTIONAL EXAMINATIONS

(No. 6534—*Civil Service Commission—F. J. V.—October 31, 1929—5 pp.*)

The provision by the Civil Service Commission that members of the Police or Fire Department who hold the Lambert Tree Medal or the Carter H. Harrison Medal be given two points extra in all pending or future promotional examinations, provided those examinees secure passing marks of 70 should be modified to apply only to the efficiency grade of the applicant.

Citations:

Statutes: Cah. '29, 29: 1177, 1178.

Civil Service act, secs. 4, 6, 9.

Cases: *People v. Errant*, 229 Ill. 56, 61 (1907).

People v. Webb, 156 Ill. 364 (1912-13).

CIVIL SERVICE EXAMINERS' ELIGIBILITY FOR CHIEF CLERK'S PROMOTIONAL EXAMINATION

(No. 6612—*Civil Service Commission—F. J. V.—March 8, 1930—1½ pp.*)

The civil service examiners employed in the comptroller's office may take the promotional examination for the position of chief clerk only

if the position of those examiners can be, and is reclassified in the same line of service as the assistant chief clerks and chief clerks.

Citation:

Reference: Op. Corp. Counsel (1925-26), p. 326.

RIGHT TO HIGHER POSITION WITHOUT PROMOTIONAL EXAMINATION

(No. 8104—City Treasurer—F. J. V.—June 27, 1933—5 pp.)

The action of the City Council in failing to make an appropriation for next year for the present position of head clerk in the treasurer's office and in making a new appropriation for head clerk and examiner at a higher salary, abolishes the former position and creates a new position of higher rank.

The present head clerk in the treasurer's office is not entitled to take the new position of head clerk and examiner at a higher salary "without a promotional examination in which all head clerks may participate."

Citations:

Statute: Civil Service act, secs. 3, 13.

Ordinance: Coun. J. (1933-34), p. 439.

Administrative rules: Civil Service Commission, Rule I, sec. 78.
Id., Rule V, sec. 2.

Cases: People v. Errant, 229 Ill. 56 (1907).
People v. Finn, 237 Ill. App. 363 (1925).

FILLING FIRE ENGINEER VACANCY BY PROMOTION

(No. 8577—Civil Service Commission—C. H. L.—November 30, 1934—6 pp.)

In filling the vacant position of fire engineer, the Civil Service Commission should first determine whether firemen are in the same class of service and in the next lower grade or rank. If so, a promotional examination must be held allowing these firemen to participate. If there are persons in the next rank or grade desirous of taking a promotional examination for the vacant position of fire engineer, a promotional examination must be held, and if there are not, an original entrance examination must be held.

Citations:

Statute: SH '33, 24½: 9 (Civil Service act).

Administrative rule: Civil Service Commission, Rule V, sec. 2.

Cases: People v. Errant, 229 Ill. 56, 66 (1907).
People v. Finn, 238 Ill. App. 17 (1925).

FILLING ENGINEER-CUSTODIAN POSITION—ENTRANCE EXAMINATION QUALIFICATIONS

(No. 7126—*Civil Service Commission—F. J. V.—September 15, 1931—*
1½ pp.)

Stationary firemen that do not have an engineer's license at the time of a promotional examination for engineer-custodian, can not be excluded from the examination; the requirement of law as to who may fill such position arises at the time of certification and appointment.

Persons taking an original civil service entrance examination must have qualifications prescribed by law and the ordinances of the city in order to participate in this examination.

Citations:

Statute: Civil Service act, sec. 9.

Case: People v. Lower, 251 Ill. 528 (1911).

D. SEPARATION FROM POSITION

(1) Resignation

REINSTATEMENT OF RESIGNED EMPLOYEE

(No. 6910—*Civil Service Commission—F. J. V.—May 22, 1931—*
4½ pp.)

A person, who has resigned from the civil service, may not be reinstated under the Civil Service Commission's present rules after thirty days from the date of resignation.

Opinion No. 6857 of March 31, 1931, to the Civil Service Commission is in accord with the above opinion.

REINSTATEMENT AFTER RESIGNATION OF EMPLOYEE

(No. 8779—*Mayor—Q. O'B.—May 25, 1935—1½ pp.*)

A civil service employee who voluntarily resigns and does not cancel his resignation with the approval of both the department head and the Civil Service Commission within thirty days after the date he files it, cannot be reinstated. Restoration to the service can be accomplished only by a new original examination.

RIGHT TO WITHDRAW RESIGNATION

(No. 8793—Mayor—Q. O'B.—June 11, 1935—1 p.)

A civil service employee's voluntary written resignation accepted by his department head becomes final and permanent unless withdrawn, with the approval of the department head and the Civil Service Commission, within thirty days from the date of filing.

Opinions No. 6971 of June 24, 1931, and No. 8794 of June 12, 1935, to the Mayor, and No. 6753 of August 14, 1930, to the Acting Commissioner of Police all are in accord with the above opinion.

**RESIGNATION WHEN CHARGES PREFERRED AGAINST
EMPLOYEE**

(No. 7209—City Comptroller—F. J. V.—October 23, 1931—2 pp.)

Where suspension has been made with notice that charges are to be preferred, no resignation should be accepted by the head of a department; if it is considered at all, it should be as a part of the hearing on the charges preferred.

To safeguard the city's interest against the possible repudiation of the resignation of an employee who has been suspended while charges against him are being preferred before the Civil Service Commission, the filing and hearing of charges and their disposition by the Civil Service Commission should be proceeded with immediately.

Citation:

Case: *People v. Harding*, 224 Ill. App. 198 (1922).

**RESIGNATION WHEN CHARGES AGAINST EMPLOYEE
PENDING**

(No. 7458—Commissioner of Police—F. J. V.—February 23, 1932—1½ pp.)

Where letters tendering resignation have been sent by criminally convicted patrolmen and charges for the removal of these patrolmen are pending before the Civil Service Commission, the Commissioner of Police should not act on these resignations, but should proceed with the prosecution of these charges.

Citation:

Case: *People v. Harding*, 224 Ill. App. 198 (1922).

RESIGNED EMPLOYEES RIGHTS ON ELIGIBLE LIST— SENIORITY AND WAGE CLAIMS IN LAYOFFS

(No. 6926—*Civil Service Commission—F. J. V.—June 3, 1931—2 pp.*)

The employees who resigned from the classified service and were later illegally restored to the eligible list, must be stricken from the list.

Under the rules of the Civil Service Commission, the last eligible person certified to a position must be the first laid off.

The city is not liable for wages that should have been paid to persons illegally laid off.

Citations:

Administrative rule: Civil Service Commission, Rule IX, sec. 1.

Cases: O'Connor v. Chicago, 327 Ill. 586 (1928).

Hittell v. Chicago, 327 Ill. 443. (1928).

RESIGNATION OF INSANE POLICEMAN

(No. 8700—*Commissioner of Police—E. R. D.—March 12, 1935—2 pp.*)

The conservatrix of the estate of a policeman committed to a hospital for the insane is not obliged, because his disability benefit has been exhausted, to sign a resignation for him. Formal charges of incapacity or inefficiency against the policeman would not be proper since he is incapable of appearing in his own defense. The policeman should be placed on a leave of absence as though he had voluntarily requested it.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, secs. 12, 46, 48.

(2) Layoff

EMPLOYEES' RIGHTS AGAINST TEMPORARIES IN LAYOFFS AND APPOINTMENTS

(No. 8777—*Mayor—Q. O'B.—May 24, 1935—4 pp.*)

A civil service employee cannot be laid off and replaced by a temporary employee without his request or consent, nor can he be required to share his time and salary with a temporary employee.

A civil service employee is not entitled to any compensation from the city for the time he has not worked, nor to any compensation paid to a temporary appointee in his position.

A temporary appointment cannot be authorized or justified when there is no vacancy and when there exists a civil service eligible list for filling the position.

Citations:

Statute: Civil Service act, secs. 10, 12.

Ordinance: Coun. J. (1934-35), p. 3306 (Annual appropriation ord.).

Case: People v. Coffin, 282 Ill. 599 (1918).

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion on the above matter, submitted through your secretary, and to the inquiry in a letter concerning the same matter written by Alderman Thomas J. Terrell, we beg to say that we have withheld our opinion pending an investigation of the facts.

We interviewed John J. Callahan, who resides at 3460 Jackson boulevard, alone and in the presence of Alderman Terrell in whose ward he resides, and by them were informed that for some time past Mr. Callahan, who is a civil service employee, has been working half-time and sharing his salary with a temporary employee who is endorsed by the Sheet Metal Workers' Union but who is not listed in the classified service of the City of Chicago as the result of any civil service examination.

The annual appropriation ordinance for 1935 provides as follows (Journal of the Proceedings of the City Council of the City of Chicago, Illinois, January 4, 1935, page 3306):

"DEPARTMENT OF BUILDINGS

"BUREAU OF BUILDING INSPECTION

	Number	Rate Per Mo.
"Sheet metal furnace inspector..36 months	3	310.00"

The salary of one sheet metal furnace inspector is, therefore, \$3,720 per year less 78 days as provided in section 8 of the said Annual Appropriation bill for 1935, or \$243.63 per month.

The Civil Service act relating to cities is a part of the contract of employment of every civil service employee, and such an employee can only be removed from his position permanently or temporarily in the manner provided for by section 12 of said act, which requires a hearing on charges preferred.

In the case of John J. Callahan there is an appropriation for the year 1935 covering the position of sheet metal furnace inspector, which position Mr. Callahan was certified to after successfully passing a civil service examination, therefore, he is entitled to fill the position to the exclusion of a temporary employee. He and Alderman Terrell inform us that he has at no time been suspended pending charges and no charges ever have been preferred against him seeking his removal, therefore, the provisions of section 12 apply in his case.

Under section 12 of the Civil Service act a head of a department has power, acting in good faith, to lay off his subordinate for a period of not exceeding thirty days because of lack of work, lack of funds, or other good cause, but there is no question or claim here that there was any lack of work or lack of funds.

Section 10 of the Civil Service act provides for temporary appointment and states its purpose in the following language:

"To prevent the stoppage of public business or to meet extraordinary exigencies, the head of any department or office may, with the approval

of the commission, make temporary appointment to remain in force not exceeding sixty days, and only until regular appointment under the provisions of this act can be made."

It will be observed that but two reasons are stated for making a temporary appointment in any case, namely, (1) "to prevent the stoppage of public business," and (2) "to meet extraordinary exigencies."

A temporary appointment cannot be authorized or justified in the instant case where there is no vacancy and where there exists a civil service eligible list for filling the position in question. If the civil service employee is ready at all times to fill the position at full time, and if there is no question of the stoppage of public business or any extraordinary exigencies, he has the right to full-time employment and full-time pay.

In *People v. Coffin*, 282 Ill. 599, the Supreme Court, in elaborating on the spirit of the civil service law, used this language, on page 610:

"While the city has a right to actually and in good faith discontinue any position when the same becomes no longer necessary or useful, yet neither it nor the Commission had any right to continue the position in force and remove appellee until charges had been preferred against him and sustained by the Commission in the manner provided by section 12 of the civil service law (*City of Chicago v. Luthardt*, 191 Ill. 516). Neither the city nor the Commission, nor both combined, can legally abolish a position temporarily for the unlawful purpose of later re-establishing it and installing therein another person as employee. To permit such a course of conduct by the judgment of this court would be, in effect, to declare the civil service law a dead letter or law enforceable only at the discretion of said city officers, whose positive duty, under the law, is to enforce it, or assist in enforcing it, according to its terms."

In conclusion, therefore, in view of the provisions of the Civil Service act, the rules made by the Civil Service Commission and the decisions of the Supreme Court, we are of the opinion that without his request or consent there is no warrant for laying off the regular civil service employee, Mr. Callahan, for any part of the time, and replacing him with a temporary employee, much less for requiring him to share his time and salary with a non-civil service employee.

Of course, Mr. Callahan is not entitled to recover from the city any compensation for the time he has not worked, or for that paid to the temporary appointee, and in restoring him to full time and full pay it would be prudent to obtain from him a written waiver of claims for back salary.

REINSTATEMENT RIGHTS IN LAYOFFS

(No. 6708—*F. J. V.*—July 8, 1930—1½ pp.)

Municipal employees who have been laid off because the City Council failed to appropriate for their positions in the last budget are entitled to be placed on the reinstatement list in the order of their seniority and to precedence to certification to any vacant position in the same branch, class, and grade of the service.

Citation:

Reference: Opinion Nos. 6691, 6973 (this volume, pp. 202, 174).

FINANCIAL OFFICERS' DISCRETION IN LAYOFFS

(No. 7927—City Comptroller—F. J. V.—February 3, 1933—7 pp.)

Persons serving in the departments of the City Comptroller, City Treasurer or City Collector are not within section 12 of the Civil Service act requiring seniority in layoffs. These officers may in their discretion remove any persons who have the handling of public funds for any reason that they may deem proper.

Citations:

Statute: Civil Service act, sec. 12.

Ordinance: Code '31: 56-61, 64, 131-133, 140-142.

Cases: Ayers v. Hatch, 56 N. E. 612 (Mass. 1900).

Harrison v. People, 222 Ill. 150 (1906).

People v. Illinois State Board of Dental Examiners, 110 Ill. 180 (1884).

Opinion No. 8923 of November 12, 1935, to the Chairman of the Committee on Finance is in accord with the above opinion.

CITY'S RIGHT TO LAY OFF—SALARY CLAIMS FOR ILLEGAL LAYOFF

(No. 8572—Chairman, Committee on Finance—Q. O'B.—November 26, 1934—3 pp.)

The city has the right, in the interest of economy, to lay off an employee or even to abolish his position entirely.

The city, in the absence of fraud, is not obliged to keep a civil service employee on its pay roll nor to pay such employee any salary when no services are rendered during a period of layoff.

A city employee, although entitled to have another removed instead of himself because of seniority priority, has no claim against the city for salary paid to the others who should have been removed, but his action should be against the employees who received such salary.

Citations:

Cases: Jacobs v. Coffin, 282 Ill. 599 (1918).

Thomas v. People, 273 Ill. 479 (1916).

McArdle v. Chicago, 216 Ill. App. 343 (1920).

Fitzsimmons v. O'Neil, 214 Ill. 494 (1920).

Herrick v. Chicago, 262 Ill. App. 647 (1931).

O'Connor v. Chicago, 327 Ill. 586 (1928).

Hittell v. Chicago, 327 Ill. 443 (1928).

Opinion No. 8573 of November 26, 1934, to the Chairman of the Committee on Finance is in accord with the above opinion.

DEPARTMENT HEADS POWER TO LAY OFF

(No. 6775—*President, Civil Service Commission and Commissioner of Public Works—F. J. V.—September 25, 1930—3½ pp.*)

The Civil Service Commission rule, providing that the person last certified should be laid off first, is applicable only to layoffs of one or a few employees, and a departmental officer may lay off a larger number of his subordinates because of lack of funds, lack of work, or other good cause, for recurrent periods of less than thirty days without regard to the rule of the Civil Service Commission.

Citations:

Statute:	Civil Service act, sec. 12.
Administrative rule:	Civil Service Commission, Rule IX, sec. 1.
Cases:	Fitzsimmons v. O'Neil, 214 Ill. 494 (1905). Thomas v. Chicago, 273 Ill. 479 (1916).

Opinion No. 7024 of July 22, 1931, to the Commissioner of Public Works is in accord with the above opinion.

SENIORITY RIGHTS WHEN POSITION ABOLISHED*

(No. 7873—*President, Civil Service Commission—F. J. V.—January 3, 1933—1½ pp.*)

Where the position of head teller which a civil service employee was filling in the capacity of head clerk has been abolished, the employee becomes entitled to the place of head clerk held by the one last certified to that position in any department except in the City Treasurer's office, where, due to the City Treasurer's financial responsibility and the consequent exaction by him of bonds from the employees who may be certified to his office, the civil service provision does not apply.

Citation:

Statute: Civil Service act, secs. 9, 12.

SENIORITY IN LAYOFFS—RECLASSIFICATION SENIORITY RIGHTS WHEN POSITION ABOLISHED*

(No. 7389—*Commissioner of Public Works—F. J. V.—December 16, 1931—2½ pp.*)

A civil service employee who is laid off in one department and who has seniority over an employee occupying a like position in another department, is entitled, by reason of the Civil Service Commission seniority rule, to take the place of the employee last certified to the like position in the other department.

Where it is felt that the mason inspectors in one department perform a work of a materially different character from that of mason inspectors in other departments, an application can be made to the

*See also Opinion No. 7704, p. 172, and Opinion No. 6973, p. 174, on seniority rights in layoffs.

Civil Service Commission to reclassify the first-mentioned mason inspectors in a rank different from that of mason inspector in the other departments.

Citation:

Reference: 16 Op. Corp. Counsel, p. 290.

SENIORITY RIGHTS OF SCHOOL TUBERCULOSIS NURSES UPON TRANSFER

(No. 7721—*Civil Service Commission*—F. J. V.—August 19, 1932—
7½ pp.)

Accumulated seniority rights of school tuberculosis nurses continue unabated upon their transfer to the Municipal Tuberculosis Sanitarium as field nurses.

The rule of seniority applies to all positions classified within the same branch, class, grade and rank of the service with the same salary scale, whatever be the particular position to which an employee is certified or transferred, whatever be the municipal jurisdiction to which such employees were assigned and whatever be the varying character of the services performed in such position; and such rule must be applied in matters of laying off civil service employees.

Citation:

Statute: Civil Service act, secs. 3, 4.

Administrative rule: Civil Service Commission, Rule IX, sec. 3.

Case: *People v. Coffin*, 282 Ill. 599 (1918).

Other reference: Opinion No. 6621 (this volume, p. 190).

EMPLOYEES' RIGHTS WHEN ABOLISHED POSITION MAINTAINED UNDER NEW NAME

(No. 7723—*Commissioner of Public Works*—L. H.—August 20, 1932—
2½ pp.)

The Civil Service act does not deprive the city of its power to abolish positions.

Where some other employee or new entrant is placed in a new position identical in duties but different in name from the one vacated by the employee claiming seniority, the person entitled to old position would have to be employed in the position under the new name.

When a civil service position is abolished, but the duties of such position are split up and added to the duties of remaining employees, the performance of such duties by existing employees will not operate

as a re-establishment of the old position under another name so as to give the discharged employee any right to perform his former duties.

Citations:

Cases: *Chicago v. People*, 114 Ill. App. 145 (1905).
Chicago v. Luthardt, 191 Ill. 516 (1901).

**SCHOOL TUBERCULOSIS PHYSICIANS' RIGHTS WHEN
POSITION ABOLISHED**

(No. 6691—*Civil Service Commission—F. J. V.—June 10, 1930—*
9½ pp.)

School tuberculosis physicians are to be certified and appointed to the positions of field health officer and school health officer, when their own positions are abolished and there are vacancies in those other positions. Civil service physicians, despite various titles and separate appropriations, are engaged in the same general line of public service and the same kind and character of work.

The abolition of civil service positions without providing for the reinstatement of the holders in other positions of the same character in the same general line of service is illegal as constituting a removal not for cause.

Positions filled by so-called temporary appointees are vacant so far as civil service eligibles are concerned.

Citations:

Ordinance:	Coun. J. (1929-30), p. 2252.
Administrative rules:	Civil Service Commission, Rule 1, secs. 4, 7, 8, 10; Rule IX, secs. 8, 12.
Cases:	<i>People v. Coffin</i> , 282 Ill. 599 (1918). <i>People v. Ellicott</i> , 243 Ill. App. 374 (1927). <i>Chicago v. Luthardt</i> , 191 Ill. 516 (1901). <i>People v. Chicago</i> , 283 Ill. 462 (1918). <i>Howe v. Finn</i> , 241 Ill. App. 622 (1926).
Other reference:	Opinion No. 6973 (this volume, p. 174).

(3) *Discharge**

POWER TO ORDER DISCHARGE OF EMPLOYEE.

(No. 7324—*Commissioner of Public Works—F. J. V.—November 28, 1931—2 pp.*)

A discharge order made by a harbormaster is invalid since the Commissioner of Public Works is the head of the Department of Public Works. There can be only one head of a municipal department.

*See opinions on pp. 143, 144 on the discharge of employees through failure to appropriate.

The power to order a discharge of a civil service employee rests exclusively with the department head, where there is one.

Citations:

Statute: Civil Service act, secs. 10, 11.

Cases: *People v. Kepley*, 171 Ill. 44, 81 (1897-98).

Thomas v. Chicago, 273 Ill. 479, 483 (1917).

POWER TO DISCHARGE EMPLOYEES

(No. 6566—*Fire Commissioner—F. J. V.—December 12, 1929—*
2½ pp.)

The Fire Commissioner is without authority to adopt departmental rules for the purpose of removing civil service employees, nor can he recommend to the Civil Service Commission the discharge of those employees. He can only prefer charges against civil service employees to the Civil Service Commission for it to act upon, and he may submit as part of those charges, failure to pass or refusal to take a suitable physical and medical examination.

Citations:

Ordinance: Code '22: 1202 as amended.

Statute: Civil Service act, sec. 12.

Other reference: Opinion No. 6552 (this volume, p. 17).

DISCHARGE OF LABORERS WITHOUT HEARING

(No. 8970—*E. R. D.—December 16, 1935—1½ pp.*)

Charges need not be brought before the Civil Service Commission to justify a discharge of one classed as a laborer and it is the prerogative of the superior officer to discharge any person in this classification at any time.

Citation:

Administrative rule: Civil Service Commission, Rule XII.

Discharge of Laborers: Section 12 of the Civil Service act, permitting municipal laborers to be discharged without charges preferred or opportunity of hearing is not unconstitutional under either the federal or the state constitution.—*People v. Chicago*, 337 Ill. 100 (1929).

DISCHARGE OF PROBATIONERS

(No. 7307—*Commissioner of Public Works—F. J. V.—November 20, 1931—2 pp.*)

The consent of the Civil Service Commission must first be obtained before a department head may order the discharge of a probationer and the reason for his discharge must be stated in the order.

A court order directing the reinstatement of probationers who were

discharged without a compliance with the civil service law, must be obeyed.

Citations:

Statute: Civil Service act, secs. 5, 10.

Case: Fish v. McGann, 205 Ill. 179, 188 (1903).

Opinion No. 6980 of July 2, 1931, to the Acting Commissioner of Police is in accord with the above opinion.

CHARGES AGAINST EMPLOYEE ON REINSTATEMENT LIST

(No. 7310—*Civil Service Commission—F. J. V.—November 21, 1931—*
2½ pp.)

One in the classified service who is not at the time actually serving in any position, but who is on a reinstatement list, may be subjected to written charges by the present head of the department in which he last served and a hearing thereon before the Civil Service Commission.

Citation:

Statute: Civil Service act, sec. 12.

Veterans' Preference in Discharge: Section 10½ of the Civil Service act grants a veterans' preference only as to certification for appointment and does not give a preference either to be retained in employment when the necessity for temporary discharge arises or to be recalled when the necessity for temporary release from employment ceases.—*People v. Collins*, 351 Ill. 551 (1933).

PROCEDURE TO REMOVE DISABLED FIREMAN

(No. 7192—*Acting Fire Commissioner—G. F. M.—October 16, 1931—*
2½ pp.)

A disabled fireman suffering from an illness not attributable to fire duty who refuses to apply for retirement can be removed from the payroll of the Fire Department by either of two methods (1) by proceedings under the rules of the Civil Service Commission for the discharge of the fireman or (2) by his retirement on pension by the Retirement Board of the Firemen's Annuity and Benefit Fund upon written application of the head of the Fire Department.

Citations:

Statute: Firemen's Pension Fund act (1917), sec. 9.

Ordinance: Code '31: 390.

REMOVAL OF DISABLED POLICEMAN

(No. 7332—Commissioner of Police—F. J. V.—November 30, 1931—2½ pp.)

Charges of incapacity, inefficiency and failure to discharge his duties should be preferred against a policeman who is permanently disabled and no longer fit for the performance of police duty, and who refuses to make an application for retirement.

DISCHARGE FOR FALSE STATEMENT OF CITIZENSHIP

(No. 6991—Acting Commissioner of Police—July 7, 1931—1½ pp.)

A false statement as to his citizenship by a member of the police force is cause for separation from the service.

DISCHARGE FOR NON-RESIDENCE IN CITY

(No. 7535—L. H.—April 9, 1932—2 pp.)

City officers and employees are required, by ordinance, to be residents of the city. The rules of the Civil Service Commission make it necessary that applicants for positions be residents of the city.

A civil service employee moving beyond the limits of the city is not automatically dropped from service. Charges must be filed against him and a hearing must be held by the Civil Service Commission.

Citation:

Ordinance: Code '31: 668.

DISCHARGE FOR NON-PAYMENT OF DEBTS—COLLECTION OF EMPLOYEES' DEBTS*

(No. 6742—Acting Commissioner of Police—F. J. V.—August 2, 1930—5 pp.)

The violation of a departmental rule that members of the department must pay their just debts incurred while in service, does not constitute sufficient legal cause for the removal of a violator in the civil service. The Civil Service Commission has no jurisdiction to try the issue of a debt between an employee and his complaining creditor.

The city cannot be made a collection agency for the claims of creditors against city employees and neither garnishment nor a creditor's

*See also pp. 156-158.

bill in equity will lie against the city to reach a debt owing to a civil service employee of the city.

Citations:

Statute: Civil Service act, secs. 4, 12.

Cases: *People v. Errant*, 229 Ill. 56 (1907).

Marbury v. Madison, 5 U. S. 137, 2 L. Ed. 60 (1803).

City of Aurora v. Schoeberlein, 230 Ill. 496 (1907).

People v. Chicago, 234 Ill. 416 (1908).

Merwin v. Chicago, 45 Ill. 133 (1867).

Chicago v. Halsey, 25 Ill. 485 (1860-6).

Addyston Pipe Co. v. Chicago, 170 Ill. 580 (1897-98).

Lamb v. Lamb, 256 Ill. App. 226 (1930).

Other references: *Black, Constitutional Law*, p. 91.

Throop, Public Officers, sec. 379.

OPINION OF FOREGOING SYNOPSIS

Your communication of July 24, 1930, calls attention to a rule of the Department of Police which appears in the book of rules as follows: "Rule 289, Police Offenses, Section 33. Neglect to pay within a reasonable time a just indebtedness incurred while in service." You asked for an opinion from the Corporation Counsel "as to whether or not the Civil Service Commission has the power to separate from the Police Department a member who violates the above rule."

The rule here stated has no support or warrant whatever under the Civil Service act or the general law. It does not come within the letter or the spirit of the act, nor is there any grant of power either express or implied to warrant the discharge of one from the civil service for the failure to pay a debt. We do not believe that it is within the power of the department itself to discipline a member thereof for failure to pay a debt; nor do we believe that the violation of such a rule constitutes legal "cause" for the discharge of one in the civil service as contemplated by the Civil Service act. The rule here stated is not that of the Civil Service Commission, nor can such a rule be binding upon the commission.

It is provided by section 4 of the Civil Service act that the

"Commission shall make rules to carry out the *purposes of this act*, and for examinations, appointments and removals in accordance with its provisions."

It is utterly foreign to the purpose of the Civil Service act that the Civil Service Commission or any department in the municipal government shall become a court for determining the question of debt laid against a member of the classified service by any creditor; and there is not a single purpose of the Civil Service act which such a rule is calculated to carry, within the meaning of said section 4 empowering the commission to make rules.

One of the earliest opinions of the Supreme Court construing the purposes of the Civil Service act is authority for our opinion that the rule in question serves no purpose of the law. That this is so appears from the Supreme Court's opinion in the case of the *People ex rel. Williams v. Errant*, et al., 229 Ill. 56-61. * * *

It is obvious that the Civil Service act was enacted for the promotion and betterment of the public service and "to increase the efficiency of the service," and to that end to place, "before the officer or employee every possible inducement to render faithful and conscientious service," and to "open up possibilities for future promotion" to all employees in the classified public service. The question whether a civil service employee is indebted to another and whether such debt is reasonable or not, whether the employee is legally liable or not and whether the Civil Service Commission may enforce the payment of such debt is in no way related to the efficiency of

the civil service employee in the discharge of his duties in the public service, and does not in any way tend to carry out the purposes of the Civil Service act.

The violation of this rule, therefore, can furnish no legal cause for the removal of one in the civil service. Section 12 of the act on the subject of removals provides that,

"No officer or employee in the classified civil service of any city who shall have been appointed under said rules and after said examination, shall be removed or discharged except *for cause*, upon written charges and after an opportunity to be heard in his own defense."

The question of whether one owes or pays a debt not only furnishes no cause for removal or discharge from the civil service, but is purely a matter of private right between creditor and debtor which may be determined only by the courts of the judiciary, and the power to judicially determine this issue, not only is not given to the Civil Service Commission but would be invalid for conferring judicial powers upon an arm of the executive branch of the government. Black's Constitutional Law, p. 91; *Marbury v. Madison*, (U. S.) 1 Branch, 137, 2 L. Ed. 60; *City of Aurora v. Schoeberlein*, 230 Ill. 496; *People v. City of Chicago*, 234 Ill. 416, 418.

Cause for the removal or discharge from the civil service must be one sufficient to warrant such removal or discharge from office. Not everything, therefore, that may be charged in writing before the Civil Service Commission will constitute cause for removal and warrant the Civil Service Commission's order or discharge. Troop in his work on Public Officers, section 379, has this to say:

"Where the statute provides that an officer may be removed, but 'only for cause and after an opportunity to be heard,' the power thus granted is not an arbitrary one to be exercised at pleasure, but only upon just and reasonable grounds, and then not until after notice to the person charged, for in no other way could we have an opportunity to be heard. The proceeding, therefore, must be instituted upon specific charges sufficient in their nature to warrant the removal; and then unless admitted, proven to be true."

That a municipal corporation and any of its departments, may not be made a collecting agency for the claims of creditors against those in the public service is a firmly established rule of law. This is for the reason that it is against public policy. It has been held that a municipal corporation exists only for public welfare, and cannot be forced into a position as that it may not pay the salaries of its officials in accordance with their lawful right to receive them, but must instead apply such salaries to the payment of the debts which the officials may be owing to creditors, or to pay such salaries as assignees.—*Merwin v. City of Chicago*, 45 Ill. 133; *City of Chicago v. Hasley*, 25 Ill. 485; *Addyston Pipe Co. v. City of Chicago*, 170, Ill. 580. Neither garnishment at law nor creditors' bills in equity will lie against a municipal corporation to enable a complaining creditor to reach a debt owing to a civil service employee by a corporation. *Lamb v. Lamb*, 256 Ill. App. 226. (Certiorari denied by Supreme Court.)

We are of the opinion, therefore, that the Civil Service Commission has no jurisdiction to try the issue of debt between the civil service employee and his complaining creditor, and that the rule here stated and its violation, do not constitute legal cause for the removal of one from the civil service.

Opinion No. 6716 of July 15, 1930, to the Civil Service Commission discusses the same point as the above opinion.

Discharge, Failure to Pay Debt: The failure of a patrolman, within a reasonable time, to pay a civil debt, notwithstanding it has been reduced to judgment, is not a legal ground for dismissal by the Civil Service Com-

mission, unless the employee is a dishonest debtor, a "confidence man," a "dead beat," or the like.—*Chicago v. Condell*, 124 Ill. App. 64, 74 (1905); *Chicago v. Gillen*, 124 Ill. App. 64 (1905).

DISCHARGE FOR NON-PAYMENT OF DEBTS

(*No. 6816—F. J. V.—December 22, 1930—3 pp.*)

The Civil Service Commission, in the absence of fraud or false pretense in the obtaining of credit or goods, has no power to discharge a municipal employee for his failure or refusal to pay his debts, even though the contract was made on the strength of his civil service position.

Citations:

Cases: *Addyston Pipe Co. v. Chicago*, 170 Ill. 580 (1897-98).
Lamb v. Lamb, 256 Ill. App. 226 (1930).

DISCHARGE FOR NON-PAYMENT OF DEBTS

(*No. 8041—Commissioner of Public Works—F. J. V.—April 29, 1933—3 pp.*)

The failure to pay debts which have been contracted by a civil service employee, under such circumstances as to constitute conduct unbecoming an officer, may be sufficient cause for preferring charges for removal.

Citations:

Statute: Hurd '05, 24: 457.
Case: *Kammann v. Chicago*, 222 Ill. 64 (1906).
Other reference: 17 Op. Corp. Counsel 623.

DISCHARGE FOR VIOLATING LEASE

(*No. 7215—M. F. M.—October 26, 1931—2 pp.*)

Salaries of city employees are not subject to garnishment. An employee in the classified civil service is subject to dismissal only when charges are preferred and proved before the Civil Service Commission; whether avoidance of the obligations under a lease by a city employee is sufficient to warrant his dismissal would depend upon the facts of his particular case.

Citation:

Case: *Mervin v. Chicago*, 45 Ill. 133 (1867).

Discharge Without Hearing: Unless charges are preferred against a civil service employee and sustained by the Civil Service Commission, as provided by section 12 of the Civil Service act, neither the city nor the commission has any right to continue the position in force and, at the same time to remove the employee.—*People v. Bundesen*, 277 Ill. App. 169 (1934).

NATURE OF DISCHARGE HEARING—SITTING IN ON CIVIL SERVICE HEARINGS

(No. 6740—*Acting Commissioner of Police—C. J. A.—July 30, 1930—2 pp.*)

Trials before the Civil Service Commission are of an administrative, rather than of a judicial nature.

The practice of allowing a member of the Police Department to sit with the Civil Service Commission in the hearing of charges against police officers has no legal basis or justification.

Citations:

Statute: Civil Service act, secs. 12, 14.

Case: City of Aurora v. Schoeberlein, 230 Ill. 496 (1907).

REHEARING AFTER FINAL DISCHARGE ORDER ENTERED

(No. 6759—*Acting Commissioner of Police—F. J. V.—August 28, 1930—2 pp.*)

The Civil Service Commission has no power to grant a rehearing after a final order of discharge has been entered on its records and it cannot, on the strength of that illegal rehearing, order the reinstatement of a discharged employee.

Citations:

Statute: Civil Service act, sec. 12.

REHEARING AFTER DISCHARGE QUASHED BY COURT

(No. 7786—*Commissioner of Police—F. J. V.—October 20, 1932—1½ pp.*)

When a court quashes a record of discharge of a municipal employee because the Civil Service Commission was without jurisdiction to order the discharge or because the commission denied the accused person the proper opportunity to make a defense, the head of the department may again submit the same charges to the commission with a request for a new hearing.

Citations:

Cases: People v. Thompson, 316 Ill. 11 (1925).

People v. Chicago, 240 Ill. App. 208 (1926).

DISCHARGE HEARINGS BY TRIAL BOARD

(No. 7039—*President, Civil Service Commission—F. J. V.—July 30, 1931—2½ pp.*)

Where a civil service case is tried before one commissioner and the commission's secretary instead of two commissioners, the Civil Service Commission's record, to be sustained by the courts, must show that the case was referred to these two as a trial board and that there was an approval of the trial board's report; otherwise the case stands as if never tried by either the commission or the trial board and may be tried anew.

Citation:

Statute: Civil Service act, sec. 12.

REHEARING DUE TO MEMBERSHIP CHANGES IN CIVIL SERVICE COMMISSION

(No. 6868—*Acting Commissioner of Health and the Civil Service Commission—F. J. V.—April 20, 1931—2 pp.*)

Since the members of the Civil Service Commission who heard a case and who are now discharged cannot now render and enter a decision and since the new commission cannot make such a record thereon, as it did not hear the evidence, a rehearing should be ordered by the present Civil Service Commission.

A civil service employee cannot be suspended for more than thirty days and must be reinstated at the end of that period.

Citations:

Statute: Civil Service act, sec. 12.

Case: *People v. Chicago*, 273 Ill. 479 (1916).

IMPROPER PROCEEDING IN DISCHARGE HEARING

(No. 7881—*Civil Service Commission—F. J. V.—January 4, 1933—1½ pp.*)

Where the Civil Service Commission held a hearing for the discharge of a patrolman prior to the time set and in the absence of the patrolman's witnesses, the proceedings were improper and the patrolman is entitled to immediate reinstatement and continuance in the service until the commission disposes of the case at a proper hearing.

Citations:

Statute: Civil Service act, sec. 12.

Case: *People v. Chicago*, 240 Ill. App. 53 (1926).

LEGALITY OF SECOND DISCHARGE HEARING FOR SAME CHARGES

(No. 6938—Acting Commissioner of Police—F. J. V.—June 8, 1931—1½ pp.)

A policeman against whom charges have been preferred and the case dismissed by the Civil Service Commission, may not again be tried on same charges.

OPPORTUNITY TO DEFEND IN DISCHARGE HEARINGS

(No. 6465—Commissioner of Police—F. J. V.—July 10, 1929—1 p.)

Due process of law and an opportunity for one to defend himself against charges was denied when the Civil Service Commission refused to grant a discharged patrolman sufficient time in which to procure the attendance of an attorney and to prepare his case.

FAILURE TO CONSIDER EVIDENCE AT DISCHARGE HEARING

(No. 7661—Mayor—F. J. V.—July 25, 1932—3 pp.)

The Civil Service Commission's order of removal of a fireman is invalid where the commission would not consider the written certificate of the fireman's personal physician and considered only the report of the departmental physician as to whether the fireman was physically fit to perform the drill evolutions ordered by his superior.

Citation:

Statute: Civil Service act, sec. 12.

COURT REVIEW OF DISCHARGE HEARINGS

(No. 8039—F. J. V.—April 28, 1933—1½ pp.)

A discharged civil service employee may apply to the Circuit or Superior Court for a review of the Civil Service Commission's record regarding the discharge. The court can only inquire into the jurisdiction of, and the procedure followed by the commission. It cannot hear evidence.

COURT'S POWER OVER DISCHARGE HEARINGS—TARDY SUITS FOR REINSTATEMENT

(No. 8772—Mayor—Q. O'B.—May 18, 1935—2½ pp.)

When the Civil Service Commission has jurisdiction and proceeds regularly according to law in discharging a policeman guilty of mis-

conduct, the courts have no power to inquire into the discretion and judgment of the commission.

When a civil service employee sues for reinstatement ten years after his discharge, the suit is barred both by the rule of laches and by the statute of limitations.

Citations:

- Cases:** *Miller v. Chicago*, 234 Ill. 416 (1908).
Carroll v. Houston, 341 Ill. 531 (1931).
Hopkins v. Ames, 344 Ill. 527 (1931).
Atlanta v. Town of Oran, 121 Ill. 650 (1886-87).
Murphy v. City of Park Ridge, 238 Ill. 67 (1909).

Discharge Hearings, Review by Courts: On certiorari to review the action of the Civil Service Commissioners in dismissing a Fire Department employee from his position, the court will inquire only as to whether the commissioners had jurisdiction and followed the form of proceedings legally applicable. The court has no jurisdiction to review the findings and to determine whether they were erroneous. *Johasski v. Chicago*, 274 Ill. App. 423 (1934).

(4) *Loss of Position Otherwise*

DEPARTMENT HEAD'S POWER TO SUSPEND

(No. 6661—*Commissioner of Public Works—J. W. B.—May 2, 1930—1½ pp.*)

The head of a department has power to suspend for cause any civil service subordinate for a period not to exceed thirty days.

Citation:

Statute: Civil Service act, sec. 12.

TIME LIMIT OF A SUSPENSION

(No. 6898—*Acting Commissioner, Gas and Electricity—F. J. V.—May 8, 1931—1½ pp.*)

A civil service employee cannot be suspended for a period longer than thirty days and at the end of that period, he must be reinstated.

Citation:

Ordinance: SH '29, 24½: 51.

REMOVAL DISTINGUISHED FROM SUSPENSION

(No. 7615—*Municipal Tuberculosis Sanitarium—F. J. V.—June 20, 1932—2 pp.*)

The power of a department head to suspend, and the power of the Civil Service Commission to remove from the civil service are entirely independent.

Suspension from the civil service carries with it suspension of salary.

Citations:

Statute: Civil Service act, sec. 12.

Case: Thomas v. Chicago, 273 Ill. 479 (1916).

REINSTATEMENT AND SALARY RIGHTS AT END OF THIRTY DAY SUSPENSION

(No. 7061—*Commissioner of Health—F. J. V.—August 7, 1931—4½ pp.*)

A department head can suspend a civil service employee for not more than thirty days and nothing can extend this period, not even a pending trial on charges before the Civil Service Commission; thus, a suspended employee is entitled to an immediate reinstatement at the end of thirty days and a place on the pay roll for his salary.

Where a suspended civil service employee fails to take advantage of his right to be reinstated at the end of the thirty day suspension period, and has not requested such reinstatement, he has no right to any salary for the period between the end of the thirty day suspension and the date of his discharge.

Citation:

Statute: Civil Service act, sec. 12.

Cases: Thomas v. Chicago, 273 Ill. 479 (1916).

People v. Coffin, 282 Ill. 599 (1918).

Chicago v. People, 210 Ill. 84 (1904).

Kenyon v. Chicago, 135 Ill. App. 227 (1908).

Bullis v. Chicago, 235 Ill. 472 (1908).

Kenneally v. Chicago, 220 Ill. 485 (1906).

O'Connor v. Chicago, 327 Ill. 586 (1928).

Hittell v. Chicago, 327 Ill. 443 (1928).

Mitchell v. Chicago, 259 Ill. App. 301 (1930-31).

Gathemann v. Chicago, 263 Ill. 292 (1914).

Opinion No. 6727 of July 24, 1930, to the Acting Commissioner of Police is in accord with the above opinion.

SALARY RIGHTS FOR SUSPENSION PERIOD UPON REINSTATEMENT

(No. 7322—*City Comptroller—F. J. V.—November 27, 1931—5 pp.*)

Civil service employees who were lawfully suspended by a department head, pending the outcome of written charges before the Civil Service Commission, and who were subsequently restored to their positions, are not entitled to a salary for the period of their suspen-

sion; this salary is lawfully payable to the temporary employees who filled their positions during the period of suspension.

Citations:

Statute: Civil Service act, secs. 10, 12.

Cases: Thomas v. Chicago, 273 Ill. 479, 483 (1916).

People v. Chicago, 283 Ill. 462 (1918).

People v. Finn, 241 Ill. App. 621 (1926).

Gathemann v. Chicago, 263 Ill. 292, 295 (1914).

Mitchell v. Chicago, 259 Ill. App. 301 (1930-31).

People v. Chicago, 242 Ill. App. 561 (1926).

O'Connor v. Chicago, 327 Ill. 586 (1928).

Hittel v. Chicago, 327 Ill. 443 (1928).

People v. Coffin, 282 Ill. 599 (1918).

Chicago v. Luthardt, 191 Ill. 516 (1901).

SUSPENSION OF FIREMAN MISSING FROM DUTY

(No. 6604—*Fire Commissioner—F. J. V.—February 18, 1930—1 p.*)

When a fireman is missing from a fire boat, his name should be removed from the pay roll as of the date he was first missing and the Fire Commissioner should report the suspension of that fireman for absence from duty to the Civil Service Commission along with the official report of the fireman's commanding officer.

EMPLOYEE'S RIGHTS ON RETURN FROM LEAVE OF ABSENCE

(No. 6776—*Civil Service Commission—F. J. V.—September 25, 1930—4 pp.*)

A civil service employee whose position was filled by certification and appointment while he was on leave of absence, has been accorded all his legal rights by restoration to the first place on the civil service eligible list, where he must remain until a vacancy in that position occurs.

Citations:

Administrative rule: Civil Service Commission, Rule VIII, secs. 3, 4.

Cases: Gersch v. Chicago, 250 Ill. 551 (1911).

Bullis v. Chicago, 235 Ill. 472 (1908).

People v. Chicago, 283 Ill. 462 (1918).

REINSTATEMENT OF POLICEMAN ON LEAVE OF ABSENCE

(No. 6859—*Acting Commissioner of Police—F. J. V.—March 31, 1931—2 pp.*)

A policeman who is on an extended leave of absence, is entitled to reinstatement if he returns before the expiration of his leave and reports to the Civil Service Commission, provided his office has not been

filled in the meantime by the certification and appointment of another from the civil service eligible list, in which case he can only demand that his name be again placed on the reinstatement list.

Citation:

Administrative rule: Civil Service Commission, Rule VIII, secs. 3, 4.

LEAVE OF ABSENCE OF EMPLOYEE RECEIVING DISABILITY PENSION

(No. 7362—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—December 10, 1931—2 pp.*)

A municipal employee who is receiving a disability pension under the Municipal Employees' Pension Fund act of 1911, must have his leave of absence renewed continuously as a prerequisite to being restored to the civil service eligible list in the event of his recovery from the disability.

Citation:

Statute: Municipal Employees' Pension Fund act (1911), sec. 9.

Retirement of Policemen and Firemen: In cities having a population exceeding 200,000 inhabitants any policeman or fireman who shall attain the age of 63 shall be retired from active service upon the order of the head of the police or fire department.—Ill. Laws (1935), p. 536.

The constitutionality of the Policemen and Firemen Retirement act providing for the retirement of policemen and firemen over sixty-three years of age was questioned in *Ryan v. Chicago*, 363 Ill. 607 (1936) but the case was decided on a procedural point as the constitutionality was not properly in issue.

E. REINSTATEMENT

(1) General Reinstatement Rights

REINSTATEMENT RIGHTS WHEN POSITIONS ABOLISHED

(No. 6572—*Chairman, Committee on Finance—F. J. V.—December 26, 1929—3½ pp.*)

Civil service employees whose positions are abolished are entitled to have their names appear upon the reinstatement list in order of seniority.

When an entire group of positions is abolished, the holders of those positions are demoted to the next lower grade or rank in the same line of service. Their name should be placed on the reinstatement list, and they are entitled to certification and appointment to the first

vacancies that may next occur in that line or any similar line of work in the classified service.

Citations:

Statute: Civil Service act, secs. 3, 4, 12.

Case: Thomas v. Chicago, 273 Ill. 479 (1916).

OPINION OF FOREGOING SYNOPSIS

In view of the 1930 appropriation ordinance, you ask the Law Department the following questions:

"If an entire group of positions is eliminated in the annual appropriation ordinance, what is the status of the present civil service occupants of such positions? Will such civil service occupants have any standing for certification or reinstatement to a position in the next lower rank, and will such occupants have a prior claim to positions of lower rank over those now holding positions in such lower rank?"

"With reference to a condition where a number of positions is abolished but not all of a rank, what is the status of the present civil service employees occupying such positions as are abolished with regard to certification to positions of the next lower rank?"

One answer will suffice for both these questions, since the abolishment of positions by an entire group or parts of groups affect alike those holding such abolished positions. Although the City Council may for reasons of economy legally abolish any position or positions in the civil service, the holders of such positions may not thereby be removed from the civil service, for section 12 of the Civil Service act expressly provides that "no officer or employee in the classified civil service of any city who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense."

Pursuant to section 4 of the Civil Service act empowering the commission to "make rules to carry out the purposes of this act," the commission adopted the following rule that applies to the cases here submitted—sections 1 and 3 of rule IX. * * *

The Supreme Court has held that where layoffs are made, by reason of the abolishing of positions or otherwise those affected shall be entitled to have their names placed at the head of a reinstatement list, according to the seniority of their certifications.—Thomas v. City of Chicago, 273 Ill. 479. It will be observed that by provision of section 3 above set out "when the position of any officer or employee has been abolished, such officer or employee *shall have precedence to reinstatement in a position of the same branch, class, grade or rank and character of work and approximate pay according to his seniority of certification.*"

Civil service employees, whose positions are abolished are entitled to have their names appear upon such reinstatement list in the order of their seniority of certification. Having been certified to the civil service prior to those whose names already appear on such reinstatement list those now reinstated upon such list, by reason of their abolished positions, are entitled to precedence on said reinstatement list for subsequent certification to the next vacancies occurring in any "position of the same branch, class, grade or rank and character of work and approximate pay." Where an entire group of positions is abolished the holders of such positions must, of necessity, be demoted to the next lower grade or rank in the same line of service. They cannot take the positions already held by certified appointees in such next lower grade or rank of service, but their names are placed on the reinstatement eligible list for such rank or grade and from such list they are entitled to certification and appointment to the first vacancies that

may thereafter occur in that line or any similar line of work in the classified service.

What constitutes the same line of service, or a line of service similar thereto, to which such laid off civil service employees may be certified, depends upon the official classification of the offices, positions and places of employment made by the Civil Service Commission in accordance with section 3 of the Civil Service act. This, however, is more a matter of fact than of law. We believe the foregoing opinion furnishes a complete legal answer to the questions submitted to us.

RIGHTS ON AND TIME LIMITATION OF REINSTATEMENT LIST

(No. 6978—*Medical Superintendent, Municipal Tuberculosis Sanitarium—F. J. V.—July 1, 1931—4 pp.*)

On a reinstatement list there appear only the names of those who are already in the civil service but who have been laid off or whose positions have been abolished. The civil service employees on this list are entitled to precedent of appointment to any position in their line of service.

There is no limitation of time to the reinstatement list. The time limitation applies to the eligible list of candidates for the civil service who have not yet been certified or appointed to any position.

Citations:

Case: People v. Errant, 229 Ill. 56 (1907).

Other references: 16 Op. Corp. Counsel 290.
Opinion Nos. 6691, 6621 (this volume, pp. 202, 190).

SENIORITY ON REINSTATEMENT LIST

(No. 7337—*Civil Service Commission—F. J. V.—December 2, 1931—1½ pp.*)

The Civil Service Commissioners cannot by civil service rules place civil service employees "at the head of a reinstatement list according to their seniority" if any employees of a greater seniority already appears on the list. The rule of the commission should merely place such employees who have been laid off, "on the reinstatement list," thus avoiding a conflict with superior seniority rights of others who may be already on the list.

Citation:

Administrative rule: Civil Service Commission, Rule IX, secs. 1, 3.

REINSTATEMENT AND PENSION REFUND RIGHTS WHEN NO SALARY APPROPRIATED

(No. 8158—*Civil Service Commission—E. R. D.—August 28, 1933—*
1½ pp.)

Where no appropriation has been made in the budget for the salaries of certain civil service employees, these employees should be carried on the reinstatement list and given all the rights and privileges that such list affords, and while on this list, they are not eligible to any refunds of money credited to them in the Municipal Employees' Annuity and Benefit Fund.

Civil service employees have the right to resign from their positions, and the reasons they assign for so doing do not affect or compromise the right of the Civil Service Commission to accept their resignations.

REINSTATEMENT RIGHTS IF POSITION'S TITLE CHANGED

(No. 6864—*Retirement Board, Policemen's Annuity and Benefit Fund—G. F. M.—April 13, 1931—2 pp.*)

A civil service employee whose name is on a reinstatement list under the title of an office, retains full rights during the time this list continues to exist, regardless of whether the title of the list is changed to correspond with the new title of an official position and regardless of whether the name of the person on this list is transferred to the reinstatement list bearing the new title.

Citations:

- Cases: *Fitzsimmons v. O'Neil*, 214 Ill. 494, 508 (1905).
People v. Coffin, 282 Ill. 599 (1918).
Chicago v. Luthardt, 191 Ill. 516 (1901).

EFFECT OF WAIVER OF CERTIFICATION ON REINSTATEMENT STANDING

(No. 7652—*Civil Service Commission—F. J. V.—July 16, 1932—2½ pp.*)

The Civil Service Commission should not arbitrarily reject a waiver of certification for reappointment and strike the name of such person from the reinstatement list as removals of employees in the classified service must be for cause and in the manner prescribed by law.

Citations:

- Statute: Civil Service act, secs. 4, 12.
Administrative rule: Civil Service Commission, Rule IV, sec. 4.

ILLEGAL RESTORATION TO CIVIL SERVICE LIST

(No. 7137—*Civil Service Commission—F. J. V.—September 19, 1931—2 pp.*)

The name of a person who has been wrongfully and illegally restored to the civil service list should be immediately stricken from it, and the person first on the list should be certified and appointed to his vacated position.

Citation:

Reference: Opinion No. 6915 (this volume, p. 171).
Opinion No. 6926 (this volume, p. 196).

REINSTATEMENT AT END OF SUSPENSION PERIOD

(No. 7219—*Commissioner of Public Works, Civil Service Commission, Harbor Master—F. J. V.—October 27, 1931—2 pp.*)

Any employee who has been suspended for thirty days while charges were filed against him before the Civil Service Commission should be reinstated when the thirty day period has expired, even though the charges are still pending before the Civil Service Commission.

Citations:

Statute: Civil Service act, sec. 12.
Case: Thomas v. Chicago, 273 Ill. 483 (1916).

PROCEDURE TO GAIN REINSTATEMENT AND SALARY AFTER SUSPENSION

(No. 7798—*Commissioner of Police—F. J. V.—November 3, 1932—3 pp.*)

After the expiration of a period of suspension, the employee has the right to immediate reinstatement in his position if he appears before the department head, demands reinstatement and offers to work. Unless he does so appear and offer to work, he has no claim for salary accruing after his period of suspension has ended.

Citations:

Statute: Civil Service act, sec. 12.
Cases: Thomas v. Chicago, 273 Ill. 479, 483 (1916).
Kenyon v. Chicago, 165 Ill. App. 227, 251 (1912).

DEMAND FOR REINSTATEMENT TO DIFFERENT POSITION

(No. 7125—*City Comptroller—F. J. V.—September 15, 1931—1½ pp.*)

The demand of an employee to be reinstated to the position of head teller-head clerk of the city is without legal support because he cannot hold both positions. As this employee was certified to the posi-

tion of head teller, he cannot invoke the seniority rule as against head clerks or tellers in the rank lower than that of head teller.

Citation:

Administrative rule: Civil Service Commission, Rule IV, sec. 3.

SALARY OF INJURED EMPLOYEE STRICKEN FROM PAY ROLL

(No. 7421—*Chairman, Committee on Finance—F. J. V.—January 18, 1932—1½ pp.*)

An employee who was not suspended by the department head, nor discharged by the Civil Service Commission, but whose name was stricken from the pay roll during an absence due to an injury, should receive pay for the time subsequent to the date he reported for work.

Veterans' Preference in Reinstatement: Section 10½ of the Civil Service act grants a veterans' preference only as to certification for appointment and does not give a preference either to be retained in employment when the necessity for temporary discharge arises or to be recalled when the necessity for temporary release from employment ceases.—*People v. Collins*, 351 Ill. 551 (1933).

(2) *Disability*

**REINSTATEMENT RIGHTS AFTER RECOVERY FROM
DISABILITY**

(No. 7644—*Board of Local Improvements and Civil Service Commission—F. J. V.—July 11, 1932—2 pp.*)

Whenever a civil service employee's mental or physical disability is removed, he is thereby entitled to reinstatement in his former position in the department where he served at the time of such disability, and the last person to have been certified to that position, no matter to what department, must be laid off.

Citation:

Administrative rule: Civil Service Commission, Rule IX, sec. 1.

Opinion No. 7640 of July 7, 1932, to the Civil Service Commission is in accord with the above opinion.

**REINSTATEMENT RIGHTS OF DISABLED EMPLOYEE
RETURNING TO POSITION**

(No. 7484—*Civil Service Commission, City Comptroller, City Clerk, Commissioner of Gas and Electricity—F. J. V.—March 9, 1932—6½ pp.*)

When a civil service employee returns from a leave of absence on ordinary disability pension, he is entitled to reinstatement to the post

held by the last person certified to a position like the one he had held, and the person holding such post must be retired to the reinstatement list.

Where there is a change of title of a position without any change of duties, the position remains in the same classification as before the change of title.

Citations:

Statute: Cah. '29, 24: 784 (Municipal Employees' Annuity and Benefit Fund act, sec. 47).

Cases: People v. Chicago, 283 Ill. 462 (1918).
People v. Finn, 241 Ill. App. 621 (1926).

REINSTATEMENT RIGHTS OF POLICEMAN UPON RECOVERY FROM DISABILITY

(No. 7304—Commissioner of Police—F. J. V.—November 19, 1931—2 pp.)

A policeman who is transferred from active service to the pension fund for a disability incurred while in the service and who has subsequently recovered from the disability, should be immediately reinstated to active service in the rank held by him at the time of his retirement.

Citations:

Statute: Police Pension Fund act (1915), sec. 4, as amended (1917).

Case: People v. Thompson, 252 Ill. App. 168 (1929).

Other reference: 16 Op. Corp. Counsel 90.

PROCEDURE FOR REINSTATEMENT UPON RECOVERY FROM DISABILITY

(No. 6907—Retirement Board, Policeman's Annuity and Benefit Fund—G. F. M.—May 19, 1931—3 pp.)

A disabled policeman who has recovered should be restored to his position in the service. The policeman is not required to apply for reinstatement but need only report back for work.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, secs. 45, 46, 50.

REINSTATEMENT OF MUNICIPAL EMPLOYEE UPON RECOVERY FROM DISABILITY

(No. 6821—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—December 29, 1930—4½ pp.)

A disabled municipal employee who has received an ordinary disability benefit from the Municipal Employees' Annuity and Benefit

Fund and whose disability continues after the period of payment of the benefit has expired, is entitled to be returned to active service as a municipal employee when the disability has ceased, if he does not retire on annuity.

Citations:

Statutes: Municipal Employees' Annuity and Benefit Fund act, sec. 46, 47, 49.

Civil Service act, sec. 12.

Case: Stiles v. Board of Trustees, 281 Ill. 636, 641 (1918).

(3) Layoff or Leave of Absence

REINSTATEMENT IN LAYOFFS

(No. 7164—Civil Service Commission—F. J. V.—October 2, 1931—2 pp.)

Proposed amendments to the Civil Service Commission rules providing that persons laid off for lack of work or similar cause shall be placed at the head of the reinstatement list in order of seniority of certification and, in case their position is abolished, at the head of the reinstatement list for the next lower grade in order of seniority of certification, are valid except that they do not apply to suspensions or layoffs not exceeding thirty days when such suspension or layoff is made in good faith and because of lack of funds.

Citation:

Case: Thomas v. Chicago, 275 Ill. 464 (1917).

REINSTATEMENT TO LOWER GRADE AFTER LAYOFF

(No. 7131—Civil Service Commission—F. J. V.—September 16, 1931—3 pp.)

A proposed amendment to the rules of the Civil Service Commission which provides that reinstatements after layoffs should be to a position of the next lower grade upon the approval of the commission is invalid as a civil service employee has a right to be reinstated in the same grade and the same rank in that grade which he originally held and his rights cannot be made subject to the approval of the commission.

Citations:

Statute: Civil Service act, secs. 4, 12.

Administrative rule: Civil Service Commission, Rule IX, secs. 1, 3.

Case: People v. Coffin, 262 Ill. 599 (1914).

REAPPOINTMENT OF EMPLOYEE LAID OFF FOR LACK OF WORK

(No. 6801—Civil Service Commission, Acting Commissioner of Police F. J. V.—November 18, 1930—4½ pp.)

A civil service employee who is laid off due to the lack of work is entitled to and should be placed on the reinstatement list and he has a right to an appointment therefrom to a vacancy for which he is eligible according to his seniority on the list.

Citations:

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|-----------------------|---|
| Statute: | Civil Service act, secs. 10, 12. |
| Administrative rules: | Civil Service Commission, Rule IV, sec. 5.
Id., Rule IX, secs. 1, 3. |
| Cases: | People v. Chicago, 283 Ill. 462 (1918).
People v. Finn, 241 Ill. 621 (1926). |

REINSTATEMENT ON EXPIRATION OF LEAVE OF ABSENCE

(No. 6969—Civil Service Commission—F. J. V.—June 23, 1931—4½ pp.)

A civil service employee at the expiration of his leave of absence should be reinstated in his old position, or if that position has been filled from the eligible register, he should be reinstated in the order of his seniority of certification in a position of the same branch, class, grade or rank, character of work, and approximate salary.

Citations:

- | | |
|----------------------|---|
| Administrative rule: | Civil Service Commission, Rule VIII, sec. 4. |
| Cases: | People v. Thompson, 316 Ill. 11 (1925).
People v. Harding, 224 Ill. App. 198 (1922).
Carroll v. Houston, 341 Ill. 531 (1931). |

Opinions No. 6709 of July 9, 1930, to the Acting Commissioner of Police, and No. 6996 of July 9, 1931, to the Civil Service Commission, are both in accord with the above opinion.

LIMITATION ON REINSTATEMENT AFTER LEAVE OF ABSENCE

(No. 7197—F. J. V.—October 19, 1931—4 pp.)

A civil service employee of the city who has been on a leave of absence is entitled to reinstatement in the active service as a municipal employee of the same grade or rank at the end of his leave but not to any specific department or position.

Citations:

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|----------------------|--|
| Statutes: | Cah. '23, 24: 950.
Cah. '29, 24: 784. |
| Administrative rule: | Civil Service Commission, Rule VIII, secs. 3, 4. |
| Other reference: | 17 Op. Corp. Counsel 90. |

RIGHTS OF EMPLOYEE RETURNING BEFORE TERMINATION OF A YEAR'S LEAVE

(No. 6410—*Civil Service Commissioner—F. J. V.—April 17, 1929—*
2½ pp.)

When a civil service employee on a year's leave of absence reports to the head of his department before the expiration of his leave, he is entitled to his former position unless during his absence the position has been filled by certification from the eligible register. If it has been so filled, he should have his name placed on the proper reinstatement list of the Civil Service Commission.

Citation:

Administrative rule: Civil Service Commission, Rule VIII, sec. 4.

RIGHTS OF EMPLOYEE ILLEGALLY DENIED REINSTATEMENT

(No. 8487—*Chairman, Committee on Finance—Q. O'B.—August 8,*
1934—13 pp.)

A municipal employee whom the court held has been unlawfully denied reinstatement to his position upon the expiration of a year's leave of absence and who was directed to be restored to that position by a court order and who has since been reinstated, has the following rights: (1) he is not entitled to any salary for the period representing the year's leave of absence; (2) he is not entitled to any salary for the period between the end of his leave of absence and the date of court adjudication, since this salary was paid to *de facto* incumbents; (3) he is entitled to his salary for the period from the date of court adjudication to the date of actual reinstatement, deducting the salary received during this period from another position in the city employ; (4) he is not entitled to "damages" for "loss" through being deprived of anticipated "increases in salary paid to said position"; (5) he is entitled to five per cent interest on whatever amounts are due him.

Citations:

- Cases:** Wardlaw v. Mayor of New York, 137 N. Y. 194 (1893).
Hittell v. Chicago, 327 Ill. 443 (1928).
O'Connor v. Chicago, 327 Ill. 586 (1928).
Durante v. Burdette, 283 Ill. 124 (1918).
Bullis v. Chicago, 235 Ill. 472 (1924-25).
People v. Thompson, 316 Ill. 11 (1925).
People v. Bradford, 267 Ill. 467 (1915).
United States v. Saunders, 120 U. S. 126 (1887).
Conway v. Chicago, 237 Ill. 128 (1908-09).
Turk v. Chicago, 352 Ill. 177 (1933).

Other references: 22 Ruling Case Law 544.
Dillon, Mun. Corp., secs. 212, 231, 233.

(4) *Illegal Discharge*

REINSTATEMENT AND BACK SALARY OF ILLEGALLY DISCHARGED EMPLOYEE

(No. 8100—*City Comptroller—F. J. V.—June 24, 1933—6 pp.*)

When the court finds that a civil service employee has been illegally discharged, the employee is a *de jure* holder of his position, and he is entitled to immediate reinstatement and immediate payment of back salary, if the amount appropriated for his position for the period involved was not paid to a *de facto* holder of his position. This payment is in no way affected by the ordinance requiring the payment of judgments against the city in the order of their date of entry nor by the ordinance requiring that appropriations unexpended at the close of year be turned over to the general fund.

Citation:

Statute: Cities and Villages act, art. VII, sec. 2.

Ordinances: Code '31: 88.

Coun. J. (1932-33), p. 2237.

Case: Chicago v. Luthardt, 191 Ill. 516 (1901).

Opinion No. 8052 of May 12, 1933, to the Chairman, Committee on Finance is in accord with the above opinion.

REINSTATEMENT UPON QUASHING OF DISCHARGE BY COURT

(No. 7843—*Fire Commissioner—F. J. V.—December 16, 1932—1½ pp.*)

A discharged fireman whose record of discharge by the Civil Service Commission has been quashed is entitled to immediate reinstatement in his position, whether an appeal be taken or not.

Citation:

Case: People v. Thompson, 316 Ill. 11 (1925).

EFFECT OF QUASHING OF DISCHARGE OF POLICEMAN

(No. 6402—*Commissioner of Police—F. J. V.—April 9, 1929—1 p.*)

A final order of the Superior Court which quashed the record of discharge entered against a police patrolman by the Civil Service Commission automatically reinstates the patrolman to his former position. The Commissioner of Police should assign the patrolman to his duties.

Citation:

Case: Evans v. Chicago Title and Trust Co., 317 Ill. 11 (1925).

EFFECT OF QUASHING OF DISCHARGE OF POLICEMAN

(No. 6453—*Commissioner of Police—F. J. V.—June 18, 1929—1½ pp.*)

The quashing of the Civil Service Commission's discharge record against a patrolman by a court entitles the patrolman to immediate reassignment to his position, but the Commissioner of Police may use his discretion as to whether he will reassign the patrolmen, or will cause him to resort to mandamus.

Citations:

- Cases: *People v. Thompson*, 316 Ill. 15 (1925).
Cronin v. Flynn, 243 Ill. App. 625 (1927).

SALARY RIGHTS UPON QUASHING OF DISCHARGE

(No. 6959—*Acting Fire Commissioner—F. J. V.—June 18, 1931—2½ pp.*)

When a discharged civil service employee is reinstated by a court order quashing the record of discharge, he is entitled to immediate reinstatement to his position and the salary appertaining thereto, but, if he fails to apply for reinstatement immediately, he is not entitled to any salary for the period between the date of the court order and the date he applied for reinstatement.

Citations:

- Cases: *People v. Thompson*, 316 Ill. 11 (1925).
Mitchell v. Chicago, 250 Ill. App. 301 (1911).
People v. Kipley, 171 Ill. 44 (1897-1898).
People v. Chicago, 242 Ill. 561 (1909).
Catheman v. Chicago, 263 Ill. 292 (1914).

**PROBATIONER DISCHARGED WITHOUT COMMISSION'S
CONSENT**

(No. 7423—*Commissioner of Public Works—F. J. V.—January 18, 1932—1½ pp.*)

A probationer, who was discharged before the consent of the Civil Service Commission was obtained, was wrongfully and illegally discharged and should be reinstated.

Citations:

- Statute: Civil Service act, sec. 10.
Case: *Fish v. McGann*, 205 Ill. 179 (1903).

**ILLEGALLY DISCHARGED EMPLOYEE'S RIGHTS WHEN
POSITION ABOLISHED**

(No. 7790—*Fire Commissioner—F. J. V.—October 21, 1932—1 p.*)

When the discharge of an employee by a department head was held illegal because of his being a fully accredited employee of the civil service, and the position which he held has been abolished, he is entitled only to a position on the reinstatement eligible list.

CHAPTER V

PENSIONS, ANNUITIES, AND BENEFITS

Pension, annuity and benefit funds for municipal employees offer a double protection, first to the municipal employee, and second, to the municipal government. The municipal employee is freed from the worries, uncertainties, and privations attendant upon the prospect of unemployment due to old age or disability; he also escapes the fear of leaving a family unprovided for in case of death. The city, and consequently the citizenry, are protected against the incompetence of super-annuated or disabled employees who might be reluctant to leave the service and lose their income. The city likewise receives the benefit of any heightened morale which emerges through these various social security funds.

In its earliest appearance in Chicago, the pension fund was extremely restricted, both as to the employees protected and as to the protection itself. The pension fund first came into being in Chicago by virtue of an act of 1849, authorizing the creation of the Firemen's Benevolent Association. Its funds were not derived from corporate revenues nor by virtue of any corporate levy, but came from firemen's contributions and voluntary donations. It offered protection only to firemen and then only in case of disability or injury consequent upon performance of duty. It was not until the last quarter of the nineteenth century that the idea of a pension for super-annuated employees found its place in the state enactments for the City of Chicago.

The very first expansion as to the type of employee protected took place in 1874 by virtue of an act providing for a pension fund which comprehended not only firemen but policemen as well. This act was followed by an amendment a year later which authorized disbursements of the fund by the corporate body directly, thus recognizing for the first time a direct obligation of the city government.

The extension of the idea of pensions, annuities and benefits beyond the limited scope of hazardous employment did not take place in Chicago until 1903 when an act was passed providing a public school employees' pension fund for cities over 100,000. In 1905 two acts were passed, one of which provided a pension fund for public library employees, the other a pension fund for water works employees, both in cities of over 100,000 inhabitants.

It was not until 1911 that Chicago experienced a truly widespread

ing expansion of the pension fund. In that year there was created by state enactment a pension fund for civil service employees in the "municipal" service of Chicago. In that same year there was likewise created the House of Correction Employees' Pension Fund.

Recent years have seen a significant change in the underlying concept of these various city employees' social security funds. Beginning with the year 1921, pension funds have been established on an accumulated reserve plan in accord with accepted actuarial practices and require a very substantial contribution on the part of the public employees. Formerly the funds were referred to as "pension funds," but they now take on the title of "annuity and benefit funds." The latter title conveys the idea of a payment earned, whereas the former connotes the thoughts of a benefice bestowed by the government.

The 1935 session of the legislature has created three additional funds—the Laborers' and Retirement Board Employees' Annuity and Benefit Fund, the Municipal Court and Law Department Employees' Annuity and Benefit Fund, and the Election Commissioners Employees' Annuity and Benefit Fund.

In summary, we have seen a growth in the expanding application of annuities, pensions and benefits. At first applied only to hazardous employments, the fire and police services, it now covers almost the whole range of city employment. Likewise, it has expanded to an elaborate set of provisions covering disability, retirement, widows, and children, and, in the case of firemen, even dependent parents. Furthermore, the philosophy has changed from that of bestowing benefits to that of earning rightful social security protection.

This chapter deals with the many questions which arise under the complicated annuity and benefit laws as they are today. There emerge not only basic problems of administering and participating in the funds, but also questions as to what, when, how and how many benefits accrue under the particular funds to the individual employee.

One other fund, the Policemen's and Firemen's Death Benefit Fund, is included in this chapter. It provides awards for surviving dependents of firemen and policemen killed in line of duty.

A. ADMINISTRATION

(1) *General Administrative Powers and Duties**

COURT CONTROL OF RETIREMENT BOARDS

(No. 7103—*Judge, Superior Court—G. F. M.—August 31, 1931—2½ pp.*)

The Retirement Board of the Municipal Employees' Annuity and Benefit Fund is a quasi-judicial body and the exercise of its discretion in making annuity awards may be compelled but cannot be controlled by the courts.

Citations:

Statutes: Cah. '29, 24: 797.

Ill. Laws (1931), p. 806.

Cases: Eddy v. People, 218 Ill. 611 (1905).

Walker v. Cook, 294 Ill. 294 (1920).

Gardner v. Bunn, 132 Ill. 403 (1889-90).

PLACING OF ANNUITY AND PENSION FUNDS WITH A LIFE INSURANCE COMPANY

(No. 8038—*Alderman, 16th Ward—G. F. M.—April 28, 1933—1½ pp.*)

The Municipal Employees', Policemen's, and Firemen's Annuity and Benefit Funds could not be placed with a life insurance company.

REIMBURSEMENT OF RETIREMENT BOARD MEMBERS FOR NECESSARY EXPENDITURES

(No. 8531—*Retirement Board, Policemen's Annuity and Benefit Fund—G. F. M.—October 19, 1934—3 pp.*)

The Retirement Board of the Policemen's Annuity and Benefit Fund has the legal power to reimburse the individual board members for money necessarily expended by them in the performance of any duty authorized by the board or performed in an emergency and subsequently approved by the board.

Citations:

Statutes: Policemen's Annuity and Benefit Fund act, secs. 2, 3, 6, 9, 11.
Municipal Employees' Annuity and Benefit Fund act, sec. 3.

*See Opinion No. 8102, p. 101, on appointment and removal of members of the Retirement Board of the Policemen's Annuity and Benefit Fund, and Opinion No. 7036, p. 101, on approval of that Board's office quarters.

INSURANCE FOR DAMAGE BY RETIREMENT BOARD EMPLOYEES

(No. 8271—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—January 15, 1934—2 pp.*)

The possible legal liability of the Municipal Employees' Annuity and Benefit Fund for damages caused by its employees using personally owned automobiles when they are on business for the fund and authorized to use such automobiles, justifies the fund in protecting itself against loss by securing blanket insurance.

CLAIMS OF FIREMEN'S PENSION OR ANNUITY FUNDS AGAINST FIRE INSURANCE COMPANIES

(No. 7520—*Secretary, Firemen's Annuity and Benefit Fund—G. F. M.—March 29, 1932—5 pp.*)

Neither the Firemen's Pension Fund nor the Firemen's Annuity and Benefit Fund has any claim against foreign fire insurance companies by reason of any of the provisions of the act of 1895 or by the provisions of the acts creating the funds.

Citations:

Statutes: Ill. Laws (1877), p. 62.

Id. (1879), p. 72.

Id. (1887), p. 117.

Id. (1901), p. 122.

Id. (1907), p. 187.

Id. (1913), p. 170.

Id. (1915), p. 292.

Id. (1917), p. 260.

Id. (1919), p. 742.

Id. (1923), p. 190.

Id. (1925), p. 196.

Id. (1927), p. 241.

Id. (1929), p. 221.

Firemen's Annuity and Benefit Fund act (1931), sec. 11.

HOUSE OF CORRECTION EMPLOYEES' PENSION FUND, ELEC- TION OF TRUSTEE TO FILL VACANCY

(No. 8861—*President, House of Correction Employees' Pension Fund G. F. M.—September 3, 1935—1 p.*)

The Board of Trustees of the House of Correction Employees' Pension Fund must hold a special election for the election of a trustee to fill the unexpired term of a trustee who has resigned.

Citation:

Statute: ISBS '35, 67: 23.

TERMINATING PENSION PAYMENTS UPON DEATH

(No. 8860—City Comptroller—G. F. M.—September 3, 1935—2 pp.)

The death of a pensioner terminates his right to a pension and when a pension is payable in the same manner as the salary, the pension should not be paid for the day on which pensioner died, when he died before 9 A. M., as no salary would have been paid for that day had the pensioner been in active service at the time of his death.

Citations:

Statutes: ISBS '35, 37: 31, 32.

Attachment and Garnishment: All annuities and benefits under the respective acts are exempt from attachment or garnishment process. See the various annuity and benefit fund acts in the 1935 Illinois Revised Statutes.

Note: In connection with this section see also opinions on p. 145 on receiving salary and pension at the same time, Opinion No. 8158, p. 218, on pension rights while on a reinstatement list, and Opinion No. 7062, p. 144, on the right of a medical examiner to hold other offices.

(2) *Finance**

CITY TREASURER'S CUSTODIANSHIP OF PENSION AND ANNUITY FUNDS AND PROPERTY

(No. 7382—City Treasurer—G. F. M.—December 14, 1931—3 pp.)

It is the duty of the City Treasurer to safeguard and handle securities and properties entrusted to him by the Policemen's, Firemen's, and Municipal Employees' Annuity and Benefit funds, so as to prevent any loss to those funds, under the penalty of being liable therefor personally on his bond.

Beyond paying for the surety bond of the City Treasurer for each fund, there is no liability attaching to the retirement boards of the various funds to meet the costs of custodianship of securities and properties of the funds.

Citations:

Statutes: SH '31, 24: 951, 1006, 1050, 1106.

Ill. Laws (1931), p. 242 (Firemen's Annuity and Benefit Fund act, secs. 7, 83).

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion as to the duty of the City Treasurer in connection with the custody of securities of the various pension funds and the liability of the several funds for the costs of safeguarding the said securities and otherwise handling the same, the following is submitted:

The Policemen's Annuity and Benefit Fund act, in section 7 thereof (Smith-Hurd's Revised Statutes, 1931, p. 582), and the Firemen's Annuity

*See also opinions on pp. 756-7 on issue of tax anticipation warrants for Firemen's Annuity and Benefit Fund.

and Benefit Fund act in section 7 thereof (Laws, 1931, p. 242), and the Municipal Employee's Annuity and Benefit Fund act in section 7 thereof (Smith-Hurd's Revised Statutes, 1931, p. 633), each provides that the City Treasurer shall be the treasurer and custodian of the annuity and benefit fund created by the respective acts, and that he shall furnish to each said Retirement Board a bond of such amount as each said board shall designate, which bond shall indemnify the said board against any loss which may result from any act or failure to act on the part of the treasurer and custodian or any of his agents. The same sections also provide that all fees and charges incidental to the procuring and giving of the bond referred to shall be paid by the respective retirement boards of the said funds. There is no other provision in any of the three acts referred to which authorizes or empowers any one of the said retirement boards to pay any expense or obligation of the treasurer other than the expense or obligation incident to his bond.

Each of the said acts further provides that it shall be the duty of all officers, officials, and employees of such city to perform any and all acts required to carry out the intentions and purposes of the acts creating the several funds, which it shall be necessary that any such officer, official, or employee shall perform, so that the provisions of the several acts may be complied with and the intentions and purposes of the respective acts fulfilled. This last provision will be found as section 61 of the Policemen's Annuity and Benefit Fund act, and as section 63 of the Firemen's Annuity and Benefit Fund act, and as section 63 of the Municipal Employee's Annuity and Benefit Fund act.

There does not appear to be any provision in any of the said acts which makes it the duty of any of the said funds to pay to the City Treasurer any amount of money as custodian of the securities, whether such payment be in connection with the expense of safeguarding the said securities, or otherwise handling same. In fact, these said several pension acts do not give to the individual retirement boards as trustees of the said funds any power or authority in connection with the safeguarding of the securities or the handling of the same, nor does it give to the said trustees the right to interfere with the City Treasurer or to dictate to the City Treasurer as to where or how said securities shall be handled, nor any voice in any of the matters which the respective acts impose upon the City Treasurer. The only power given to the respective trustees of the pension funds in question, so far as relates to the City Treasurer, is the power to require an indemnifying bond from the City Treasurer. In the event that the monies or securities of any one of the pension funds should be in jeopardy because of any remissness on the part of the City Treasurer, the respective trustees or retirement boards would have the inherent power as trustees to take such steps as might be necessary to preserve and conserve the monies, securities and properties of their respective funds. Any expense incident to this latter situation would be chargeable to the City Treasurer and recoverable from him personally or on his bond. In so far as the keeping of a record of the securities and the collection of the interest thereon may constitute part of the administrative work of any of the said retirement boards, such board has the power to make such expenditures as may be necessary to the proper administration of the fund.

I am of the opinion that it is the duty of the City Treasurer as custodian of the respective annuity and benefit funds to so safeguard and handle the securities and property entrusted to him as to prevent any loss ensuing to the respective funds, under the penalty of being liable therefore personally and on his bond; and that no liability rests upon any one of the several funds herein referred to, to pay any part of the costs of the custodianship of the said securities, their safeguarding or their handling in any manner; nor does there appear to be in any of the acts creating the funds in question any provision authorizing or empowering the respective retirement boards

or trustees of the said funds to pay anything to the City Treasurer for his costs or expenses as treasurer and custodian of the said respective funds.

Opinion No. 8887 of September 27, 1935, to the Retirement Board of the Policemen's Annuity and Benefit Fund deals with the same general subject as the preceding opinion.

Tax Levy Limitations: Taxes levied for the Policemen's Annuity and Benefit Fund and the Municipal Employees' Annuity and Benefit Fund have been held to be "taxes for purposes of pension fund" within the meaning of the statute exempting taxes for such purpose from the limitation on the total tax levy.—*People v. New York Central R. R. Co.*, 356 Ill. 67 (1934).

POLICEMEN'S ANNUITY AND BENEFIT FUND, AUTHORIZATION OF PAYMENTS

(No. 8507—*Retirement Board, Policemen's Annuity and Benefit Fund*—G. F. M.—September 26, 1934—3 pp.)

No money can be paid out of the Policemen's Annuity and Benefit Fund unless ordered by a majority of the members of the Retirement Board.

When payrolls, pensions, annuities and benefits are authorized and ordered by a majority of the members of the Retirement Board, the president of the Retirement Board must sign the routine checks for these periodic payments without requiring repetitive action by or subsequent approval of the board.

Citations:

Statutes: Policemen's Annuity and Benefit Fund act, secs. 4, 6(g), 6(m), 6(n), 8, 15, 18, 20, 23, 43, 45, 46, 48½, 50.

Administrative rule: Policemen's Annuity and Benefit Fund Rules and Regulations, art. II, sec. 2.

RETIREMENT BOARD'S BORROWING POWER

(No. 7794—*Retirement Board, Policemen's Annuity and Benefit Fund*—G. F. M.—October 28, 1932—4 pp.)

The Retirement Board of the Policemen's Annuity and Benefit Fund may obtain a loan to meet its current obligations when its income from taxes and investments is insufficient and when in the judgment and wise discretion of the Retirement Board, such loan is prudent and necessary.

Citation:

Statute: SH '31, 24: 946.

LIBRARY EMPLOYEES' PENSION FUND MONIES, USE FOR OTHER THAN PENSION PURPOSES

(No. 7678—*Secretary, Board of Directors, Chicago Public Library*—C. J. A.—August 1, 1932—2 pp.)

Any monies turned over by the Board of Directors of the Chicago

Public Library to the Board of Trustees of the Library Employees' Pension Fund or to the City Treasurer as custodian of such Pension Fund, cease to be the general funds of the Public Library and become special funds usable only for pension purposes; and such monies cannot be surrendered by the trustees of the Pension Fund to the Library Board of Directors.

Citations:

Statutes: SH '31, 81: 55 et seq. (Library Employees' Pension Fund act, secs. 1, 3, 4, 6).

RECOVERY ON FORGED PENSION CHECK

(No. 6974—*Retirement Board, Policemen's Annuity and Benefit Fund*—G. F. M.—June 26, 1931—2 pp.)

When a bank pays a check on a forged indorsement and the check was never received by the payee, and the payee has no interest in the check, the bank is liable to the drawer of the check for the amount so paid out.

The Retirement Board of the Policemen's Annuity and Benefit Fund is entitled upon giving proper notice to recover from its bank of deposit the amount of money paid out on a check payable to pensioner who died before receiving the same, when the name of that deceased pensioner was forged and payment made to the forger.

Citations:

Statutes: Cah. '29, 16a: 22, 23.

Cases: First National Bank v. Pease, 168 Ill. 40 (1897).

**MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND,
INVESTMENT IN TAX ANTICIPATION WARRANTS**

(No. 7040—*Retirement Board, Municipal Employees' Annuity and Benefit Fund*—G. F. M.—July 30, 1931—2 pp.)

The Retirement Board of the Municipal Employees' Annuity and Benefit Fund may properly invest the monies of the fund in any tax anticipation warrants issued by the City of Chicago, without regard to the specific fund out of which such tax anticipation warrant is to be paid, when such fund is the one for which the City Council has made an appropriation and for which it passed a tax levy.

Citations:

Cases: Fuller v. Heath, 89 Ill. 296 (1878).

Schulenberg and Boeckler Lumber Co. v. City of East St. Louis, 166 Ill. 232 (1897).

Investment of Funds: The Retirement Board shall have the power to invest the monies of said annuity and benefit fund in tax anticipation warrants of any city in which this act is in force and effect, or of any school district within such city. Ill. Laws (1931), p. 306.

MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND, INVESTMENT IN WATER FUND CERTIFICATES

(No. 6500—*Retirement Board, Municipal Employees' Annuity and Benefit Fund*—G. F. M.—September 3, 1929—15 pp.)

The monies of the Municipal Employees' Annuity and Benefit Fund may be invested in the City of Chicago Five Per Cent Water Fund Certificate of Indebtedness Bonds.

The fact that a certificate of indebtedness bond is payable solely out of a special fund does not affect its character as a bond of the city, but, in the absence of proper legislation, only affects its negotiability.

The present issuance of certificate of indebtedness bonds, payable out of the water fund of the city, is not an attempted evasion of the debt-limiting provision of the Constitution. The legislature has the power to segregate a particular revenue of a city and to direct that it be devoted to a certain purpose exclusively.

Citations:

Statutes: Municipal Employees' Annuity and Benefit Fund act, sec. 6, par. G.

SH '27, 28: p. 1856 (Negotiable Instruments act).

Ill. Laws (1855), p. 111.

Id. (1929), p. 273.

Ill. Private Laws (1863), ch. XV, secs. 13, 32.

Cases: Northern Trust Co. v. Wilmette, 220 Ill. 417 (1906).

People v. Hummel, 215 Ill. 71 (1905).

City of Joliet v. Alexander, 194 Ill. 457 (1901-02).

Leonard v. City of Metropolis, 232 Ill. 89 (1908).

Wagner v. City of Rock Island, 146 Ill. 139 (1892-93).

Moffit v. Decatur, 322 Ill. 82 (1927).

Board of Supervisors v. City of Springfield, 63 Ill. 66 (1872).

People v. Grover, 258 Ill. 124 (1913).

Firemen's Benevolent Association v. Lounsbury, 21 Ill. 510, 513 (1866-67).

Other references: 4 Ruling Case Law 47.

44 CJ 1126.

RETIREMENT BOARD'S POWER TO WAIVE INTEREST ON INVESTMENTS

(No. 8687—*Retirement Board, Municipal Employees' Annuity and Benefit Fund*—G. F. M.—February 27, 1935—2 pp.)

The Retirement Board of the Municipal Employees' Annuity and Benefit Fund may not waive interest due on monies of its trust fund invested for the benefit of contributors and participants in the fund.

HOUSE OF CORRECTION PENSION BOARD—SALE AND PURCHASE OF SECURITIES

(No. 8069—*President, House of Correction Employees' Pension Fund*—G. F. M.—May 18, 1933—2½ pp.)

The Board of Trustees of the House of Correction Employees' Pension Fund may sell bonds owned by it, if at a profit, and purchase with the proceeds of such sale other authorized securities without obtaining the consent of a majority of the contributors to the fund.

Citations:

Statutes: SH '31, 67: 21, 23.

RETIREMENT BOARD'S POWER TO SELL SECURITIES

(No. 7629—*Retirement Board, Policemen's Annuity and Benefit Fund*—G. F. M.—June 29, 1932—3 pp.)

The Retirement Board of the Policemen's Annuity and Benefit Fund has the right to sell, for the best price obtainable, any of the securities held by it in its own name, whenever, in the discretion of the board it appears to be to the best interest of the fund to sell such securities.

Citations:

Statutes: Policemen's Annuity and Benefit Fund act, sec. 2, 6.

RETIREMENT BOARD'S SALE OF SECURITIES AND REINVESTMENT

(No. 6766—*Retirement Board, Municipal Employees' Annuity and Benefit Fund*—G. F. M.—September 12, 1930—3 pp.)

The Retirement Board of the Municipal Employees' Annuity and Benefit Fund has the implied power and is under a duty to sell securities in which the money of the fund is invested and to reinvest the proceeds from the sale in other legal securities, when that course of action will result to the financial advantage of the fund.

Citations:

Statutes: SH '29, 131: 2, 6.

Cases: Casey v. Canavan, 93 Ill. App. 538 (1901).

Crown Co. v. Cohn, 172 Pac. 804 (Ore., 1918).

White v. Sherman, 168 Ill. 589 (1897).

Other references: 26 Ruling Case Law 1286, note 15.

39 Encyclopedia of Law and Procedure 371.

Opinion No. 8457 of July 9, 1934, to the Retirement Board, Municipal Employees' Annuity and Benefit Fund is in accord with the above opinion.

B. TRANSFERS TO ANOTHER FUND

(1) *General Rights*

MUNICIPAL EMPLOYEES' FUND CONTRIBUTOR WHO TRANSFERS TO FIRE DEPARTMENT

(No. 6676—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—May 20, 1930—6½ pp.*)

A municipal employee who has been a contributor to the Municipal Employees' Annuity and Benefit Fund and who has been transferred to the Fire Department, and is contributing to the Firemen's Pension Fund, has the following rights:

(1) he may leave his money in the Municipal Employees' Annuity and Benefit Fund and have the amount improved by interest until he reaches the age of sixty-five years, and then apply for, and be paid the annuity which his money has earned for him;

(2) he may apply for a refund of his salary deductions at any time before he attains the age of sixty-five years, but in that event interest on his salary deductions cannot be added to the refund;

(3) his widow can elect the fund to which she wishes to apply for her pension, providing that he has not already withdrawn his money from the Municipal Employees' Annuity and Benefit Fund;

(4) he may earn a pension or annuity under both the Municipal Employees' Annuity and Benefit Fund and under Firemen's Pension, but he cannot receive and be paid more than one pension as he is limited by the provisions of the Municipal Employees' Annuity and Benefit Fund act.

Citations:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 12, 26 (par. 2), 27(a), 39(a).

Other reference: 16 Op. Corp. Counsel 240.

TRANSFER FROM "MUNICIPAL SERVICE," EFFECT ON RIGHTS IN MUNICIPAL EMPLOYEES' FUND

(No. 7253—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—November 4, 1931—1½ pp.*)

An employee whose position was formerly classified as "municipal" but which has since been changed to that of the Fire Department is entitled to credit in the Municipal Employees' Annuity and Benefit

Fund until the date of the change in classification provided he does not take the refund of salary deductions, and provided further that no credit is to be given for any period during which he failed to make proper contributions to the fund, unless he makes up any such deficiency.

Opinions No. 7265 of November 6, 1931, and No. 7348 of December 7, 1931, to the Retirement Board, Municipal Employees' Annuity and Benefit Fund are in accord with the above opinion.

TRANSFER FROM "MUNICIPAL SERVICE" TO FIRE DEPARTMENT

(No. 7264—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—November 6, 1931—2 pp.)

An employee whose position was formerly classified as "municipal" but which was later classified as in the Fire Department is entitled to a service credit in the Municipal Employees' Annuity and Benefit Fund up to date of change in classification.

Salary deductions that were paid into the Municipal Employees' Annuity and Benefit Fund by an employee subsequent to a change in the classification of the position to that of Fire Department should be transferred to Firemen's Annuity and Benefit Fund or be applied to his credit in the Municipal Employees' Annuity and Benefit Fund for any period for which he failed to make the proper contributions, but no credit can be given for any time during which he failed to make the proper contributions unless upon being notified he promptly pays the specified amount of the deficiency.

Citations:

Statutes: Firemen's Pension Fund act (1917), sec. 13.

Municipal Employees' Annuity and Benefit Fund act, sec. 51.

Opinion No. 7328 of November 30, 1931, to the Retirement Board, Municipal Employees' Annuity and Benefit Fund is in accord with the above opinion.

MUNICIPAL EMPLOYEES' FUND—REFUND OF SALARY DEDUCTIONS UPON TRANSFER TO FIRE DEPARTMENT

(No. 7808—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—November 14, 1932—1½ pp.)

A former member of the Municipal Employees' Annuity and Benefit Fund who enters the fire service and becomes a member of the Firemen's Annuity and Benefit Fund is entitled to a refund of his salary deductions paid into the Municipal Employees' Annuity and Benefit Fund.

SERVICE CREDITS AFTER REFUNDS ACCEPTED UPON TRANSFER FROM MUNICIPAL TO FIRE SERVICE

(No. 7340—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—December 4, 1931—1½ pp.)

An employee who was a participant in the Municipal Employees' Annuity and Benefit Fund, but who is now a participant in the Firemen's Annuity and Benefit Fund, and who has taken a refund of the money paid into the Municipal Employees' Annuity and Benefit Fund, has forfeited all rights to any credit in that fund, unless he shall later reenter that fund.

Citations:

Statutes: Firemen's Pension Fund act (1917), sec. 13.
Municipal Employees' Annuity and Benefit Fund act, sec. 39(a).

Opinions No. 7341 of December 4, 1931, and No. 7347 of December 7, 1931, to the Retirement Board, Municipal Employees' Annuity and Benefit Fund are in accord with the above opinion.

MUNICIPAL EMPLOYEES' FUND, REFUND OF SALARY DE- DUCTIONS IF TRANSFERRED TO FIRE DEPARTMENT

(No. 7064—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—August 8, 1931—3 pp.)

A municipal employee who contributed to the Municipal Employees' Annuity and Benefit Fund and subsequently transferred to the Fire Department was no longer a municipal employee for the purposes of this fund, and he is considered to be a resigned municipal employee from the date of such transfer; after his death, his estate is entitled to a refund of the salary deductions made to the Municipal Employees' Annuity and Benefit Fund.

Citations:

Statutes: Municipal Employees' Annuity and Benefit Fund act, secs. 1, 12, 39(a).

MUNICIPAL EMPLOYEES' FUND, REFUNDS UPON BECOMING MEMBER OF HOUSE OF CORRECTION PENSION FUND

(No. 8448—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—June 27, 1934—2 pp.)

The purpose of pension laws is beneficial and they should be liberally construed in favor of those intended to be benefited.

A House of Correction employee who has applied for and become a member of the House of Correction Pension Fund is entitled to a re-

fund of the salary deductions made for annuity purposes and formerly deposited in the Municipal Employees' Annuity and Benefit Fund.

Citations:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 12.

Case: Colton v. Trustees, 287 Ill. 56, 61 (1919).

SALARY DEDUCTIONS UPON TRANSFER FROM POLICE TO FIRE SERVICE

(No. 6460—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—June 28, 1929—3 pp.)

For purposes of calculating annuities and benefits, the salary received by a deceased policeman in the Fire Department prior to service on the police force, is to be treated as if the entire service had been on the police force.

There is no provision in the Firemen's Pension Fund act relative to paying out salary deductions from the Firemen's Pension Fund to the Policemen's Annuity and Benefit Fund; in such case, a request can be made to the Firemen's Pension Fund trustees to transfer to the Policemen's Annuity and Benefit Fund the amount of salary deducted from the policeman during his period of service in the Fire Department for the consideration of said trustee.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, sec. 41.

Opinion No. 7011 of July 14, 1931, to the Retirement Board of Policemen's Annuity and Benefit Fund is in accord with the above opinion.

POLICEMEN'S ANNUITY AND BENEFIT FUND, SERVICE CREDITS FOR FIRE DEPARTMENT SERVICE

(No. 6677—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—May 22, 1930—4 pp.)

A member of the Police Department who has rendered service as a regular member and was a contributor to the Firemen's Pension Fund is entitled to be credited for annuity and benefit purposes in the Policemen's Annuity and Benefit Fund with the period of service rendered in the Fire Department. Any salary deductions, not paid by him into the Firemen's Pension Fund during his period of service in the Fire Department, should be paid by him into the Policemen's Annuity and Benefit Fund before his service in the Fire Department is credited to him in the Policemen's Annuity and Benefit Fund.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, sec. 41.

POLICE PENSION FUND, FIRE SERVICE CREDITS—RECOVERY OF BACK PENSION

(No. 7936—*Retirement Board, Policemen's Annuity and Benefit Fund*—G. F. M.—February 9, 1933—2½ pp.)

In computing the term of service of a policeman for pension purposes under the Police Pension Fund act of 1915, as amended 1917, his service in the Fire Department of the city is included with his period of service in the Police Department.

A person cannot recover any back pension due him for more than one year prior to the date of making application for the same when the act so provides.

Citations:

Statutes: Policemen's Pension Fund act, 1915 (as amended 1917), sec. 5.
Policemen's Annuity and Benefit Fund act, sec. 50.

POLICEMEN'S ANNUITY AND BENEFIT FUND, SERVICE CREDITS FOR FIRE SERVICE

(No. 8744—*Retirement Board, Policemen's Annuity and Benefit Fund*—G. F. M.—April 16, 1935—1½ pp.)

A person who served in the Fire Department and then resigned, and subsequently served in the Police Department, is a "present employee" within the meaning of the Policemen's Annuity and Benefit Fund act when such policeman was in the fire service on December 31, 1921.

Any service rendered by a policeman as a member of the Fire Department is counted for annuity and benefit purposes as if that service had been rendered in the Police Department.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, sec. 12, 41.

FIREMEN'S ANNUITY AND BENEFIT FUND, PARTICIPATION UPON TRANSFER FROM MUNICIPAL SERVICE

(No. 7910—*Retirement Board, Firemen's Annuity and Benefit Fund*—G. F. M.—January 23, 1933—3 pp.)

An employee in the municipal service, who paid salary contributions to the Municipal Pension Fund and the Municipal Employees' Annuity and Benefit Fund, and who became a member of the fire service, was entitled to become a participant in the Firemen's Pension Fund at any time after his appointment to a position in the fire serv-

ice, but he must first pay into the Firemen's Annuity and Benefit Fund the salary deductions that he would have had to pay had he been a member of Firemen's Pension Fund and the Firemen's Annuity and Benefit Fund from the date of his entering the fire service.

Citation:

Statute: Firemen's Pension Fund act (1917), sec. 13.

(2) Salary Deductions Paid Wrong Fund

FIREMEN'S FUND, TRANSFER OF SALARY DEDUCTIONS PAID TO MUNICIPAL EMPLOYEES' FUND—SERVICE CREDITS

(No. 7235—Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—October 30, 1931—2 pp.)

An employee holding positions classified in the fire service has been at no time eligible to membership in the Municipal Employees' Annuity and Benefit Fund, and all salary deductions paid into that fund for his account should be transferred to the Firemen's Annuity and Benefit Fund. His service credit should date from the time his position was first classified in the fire service if he makes up any deficiencies in the amount of the contributions he should have made during such period to the Firemen's Annuity and Benefit Fund.

Citation:

Statute: Firemen's Pension Fund act (1917), sec. 13.

Opinions No. 7234 and No. 7236, both of October 30, 1931, and Opinion No. 7330 of November 30, 1931, all to the Retirement Board, Firemen's Annuity and Benefit Fund, and opinions No. 7357, 7358 and 7359, of December 8, 1931, to the Retirement Board, Municipal Employees' Annuity and Benefit Fund, are in accord with the above opinion.

FIREMEN'S FUND, TRANSFER RIGHTS FROM MUNICIPAL EMPLOYEES' FUND

(No. 7224—Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—October 28, 1931—2 pp.)

An employee who has continued to pay salary deductions into the Municipal Employees' Annuity and Benefit Fund since becoming a member of the Firemen's Annuity and Benefit Fund is entitled to have those deductions transferred from the Municipal Employees' Annuity and Benefit Fund to the Firemen's Annuity and Benefit Fund and to receive a service credit in the latter fund beginning with the date he entered the fire service. If the amount standing to his credit in the Municipal Employees' Annuity and Benefit Fund is less than the amount which he should have paid had he been a participant

in the Firemen's Annuity and Benefit Fund from the time of his entrance into the fire service, he must make up the difference.

Citations:

Statutes: Firemen's Pension Fund act (1917), sec. 13.
Firemen's Annuity and Benefit Fund act, sec. 51.

Opinions No. 7260 of November 5, 1931, and No. 7329 of November 30, 1931, both to the Retirement Board, Municipal Employees' Annuity and Benefit Fund; and Opinions No. 7229 and 7230, both of October 29, 1931, and to the Retirement Board, Firemen's Annuity and Benefit Fund, are all in accord with the above opinion.

TRANSFER FROM MUNICIPAL SERVICE TO FIRE SERVICE

(No. 7343—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—December 4, 1931—2 pp.)

Sums contributed to the Municipal Employees' Annuity and Benefit Fund by an employee after he had been transferred from the municipal service to the fire service are payments in error and should be placed to his credit in the Firemen's Annuity and Benefit Fund. Since the employee did not take a refund of the sums that he has contributed to the Municipal Employees' Annuity and Benefit Fund before his transfer, he is entitled to a service credit in that fund up to the date of transfer, subject to section 51 of that act, provided he receives no credit for any period of time during which he failed to make proper contributions, unless he pays the deficiency upon being notified.

Citations:

Statutes: Firemen's Pension Fund act (1917), sec. 13.
Municipal Employees' Annuity and Benefit Fund act, sec. 39(a), 51.

PAYMENTS TO FIREMEN'S PENSION FUND PRIOR TO TRANSFER TO FIRE DEPARTMENT

(No. 7268—Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—November 6, 1931—1½ pp.)

Salary deductions paid into the Firemen's Pension Fund by an employee prior to a change in classification, changing the position from "municipal" to that in the Fire Department, should be applied to any period after the change in classification during which he received his salary and failed to make the proper contributions to the Firemen's Pension Fund, and the remainder should then be transferred to the Municipal Employees' Annuity and Benefit Fund to the account of the employee; this employee is entitled to a service credit

in the Firemen's Annuity and Benefit Fund from the date of change in the classification.

Citations:

Statutes: Firemen's Pension Fund act (1917), sec. 13.

Firemen's Annuity and Benefit Fund act, sec. 51.

Opinion No. 7276 of November 9, 1931 to the Retirement Board, Firemen's Annuity and Benefit Fund is in accord with the above opinion.

**MUNICIPAL EMPLOYEES' FUND, SALARY DEDUCTIONS PAID
TO WRONG FUND**

(No. 7247—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—November 2, 1931—1½ pp.)

A person holding the position of junior fire alarm operator was properly a participant in and should have been a contributor to the Municipal Employees' Annuity and Benefit Fund during his entire period of service until this position was transferred to the fire service on May 13, 1931. His salary deductions paid into the Firemen's Pension Fund prior to that date should be transferred to the Municipal Employees' Annuity and Benefit Fund, and he should be charged by that fund with any unpaid deductions properly payable during his period of service up to the time his position was transferred to the fire service. No credit should be given him by the Municipal Employees' Annuity and Benefit Fund for any period of time for which he has not contributed as required by the Municipal Employees' Pension Fund act of 1911.

**SALARY DEDUCTIONS PAID TO WRONG FUND,
DISPOSITION OF**

(No. 7495—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—March 15, 1932—2½ pp.)

Where an employee was properly a participant in the Firemen's Pension Fund from and after his appointment as temporary fire telephone operator on October 31, 1922, his contributions and salary deductions should have been paid into the Firemen's Pension Fund from and after that date. Any salary deductions paid into the Municipal Employees' Annuity and Benefit Fund for his credit, subsequent to that date, were paid in error and should be transferred to the Firemen's Annuity and Benefit Fund.

This employee is entitled to a service credit in the Municipal Employees' Annuity and Benefit Fund for all service rendered by him as an employee of the city prior to October 31, 1922, subject to the provisions of section 51 of the Municipal Employees' Annuity and Benefit Fund. The salary deductions or contributions paid by him

into the Municipal Employees' Annuity and Benefit Fund should be transferred to the Firemen's Annuity and Benefit Fund, less any amount which might be owing to the former fund as salary deductions or contributions due from him for periods of service prior to October 31, 1922.

Citations:

Statute: Municipal Annuity and Benefit Fund act, sec. 51.

Other reference: Opinion No. 7294 (this volume, p. 262).

Opinion No. 7485 of March 9, 1932, to the Retirement Board, Firemen's Annuity and Benefit Fund, is in accord with the above opinion.

SALARY DEDUCTIONS MADE TO WRONG FUND, DISPOSITION OF

(No. 7970—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—March 15, 1933—1½ pp.*)

Deductions for the Municipal Employees' Annuity and Benefit Fund made from the salary of the secretary of the Fire Department were made in error. The total of those deductions should be used to make up the proper credit in the Firemen's Annuity and Benefit Fund, and any excess shall be refunded to him.

Citation:

Reference: Opinion No. 7910 (this volume, p. 241).

SALARY DEDUCTIONS ERRONEOUSLY PAID INTO THE MUNICIPAL EMPLOYEES' FUND, TRANSFER WITH INTEREST

(No. 7199—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—October 20, 1931—11½ pp.*)

The salary deductions from the salaries of the chief surgeon and police surgeons since June 1, 1910, when these offices were transferred from the Department of Health to the Department of Police, were improperly paid by the city into the Municipal Employees' Pension Fund and the Municipal Employees' Annuity and Benefit Fund, which superseded it. These deductions, therefore, with the interest accumulated on them at the rate of four per cent per annum should be transferred *in toto* to the Policemen's Annuity and Benefit Fund to be dealt with there according to the law governing that fund.

Citations:

Statutes: Policemen's Pension Fund act (1915), secs. 7, 12.
Policemen's Annuity and Benefit Fund act (1921), secs. 12, 50.

Ordinances: Code '05: 1731, as amended Coun. J. (1910-11), p. 3782.
Code '11, 56: 1907, as amended Coun. J. (1910-11), p. 287.
Coun. J. (1921-22), p. 447.

Cases: People v. Foreman, 296 Ill. 487 (1921).
Hope v. City of Alton, 214 Ill. 102 (1905).

SALARY DEDUCTIONS PAID WRONG FUND, TRANSFER WITH INTEREST

(No. 7381—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—December 14, 1931—3 pp.*)

In transferring salary deductions of police surgeons from the Municipal Employees' Annuity and Benefit Fund to the Policemen's Annuity and Benefit Fund, interest should be paid by the Retirement Board of the former fund at the rate of four per cent for all such deductions received and until the date of the transfer of the money.

Citations:

Statutes: Municipal Employees' Pension Fund act (1911), sec. 4.
Municipal Employees' Annuity and Benefit Fund act, sec. 6(e).
SH '31, 74: 2.

ERRONEOUS PAYMENT OF SALARY DEDUCTIONS AND CITY CONTRIBUTIONS

(No. 6828—*Retirement Board, Policemen's Annuity and Benefit Fund—G. F. M.—January 22, 1931—2½ pp.*)

The deductions from the salaries of police matrons which are credited to the Municipal Employees' Annuity and Benefit Fund should be paid into the Policemen's Annuity and Benefit Fund together with interest of four per cent per annum, but no part of the contributions of the city from taxes credited to the police matrons in the Municipal Employees' Annuity and Benefit Fund should be transferred to the Policemen's Annuity and Benefit Fund.

Citations:

Statutes: Cah '29, 24: 754(a), 868.

SALARY DEDUCTIONS PAID WRONG FUND, TRANSFER TO POLICE PENSION FUND

(No. 8814—*Retirement Board, Policemen's Annuity and Benefit Fund—G. F. M.—July 16, 1935—4½ pp.*)

A contributor to the Municipal Employees' Pension Fund who has been a member of the Police Department since 1913 as a department inspector and probationary police secretary should have his salary deductions since 1913 transferred to the Policemen's Annuity and Benefit Fund.

The Police Pension Fund act of 1887 which was in force in 1913 used the words "police force" and "police department" synonymously,

and includes the offices of department inspector and probationary police secretary in the fund.

Citations:

Statutes: Police Pension Fund act (1887), sec. 3 as amended (1911), sec. 6.

Ordinances: Code '31: 2999-3007.

Case: People v. Foreman, 296 Ill. 487 (1921).

C. MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND

(1) *Scope*

MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND ACT, EXTENT OF APPLICATION

(No. 7888—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—January 6, 1933—2½ pp.*)

The Municipal Employees' Annuity and Benefit Fund act does not apply to any employee of the city or the Board of Education who shall be a participant in any annuity and benefit fund or other fund except the Municipal Employees' Annuity and Benefit Fund or its predecessor, the Municipal Pension Fund and the School Employees' Pension Fund.

An employee of the city is not entitled to be credited in the Municipal Employees' Annuity and Benefit Fund for any time during which he did not work in the service or did not contribute to the fund.

Citations:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 12.

Case: Carpenter v. Chicago, 199 Ill. App. 558 (1917).

EMPLOYEE HOLDING POSITION THROUGH STOLEN CERTIFICATE

(No. 8716—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—March 14, 1935—2 pp.*)

A person who held a position under a stolen civil service certificate was never a municipal employee and is not entitled to any of the benefits of the Municipal Employees' Annuity and Benefit Fund.

Deductions made from the salary of two brothers serving under a stolen civil service certificate should be refunded to them jointly with-

out interest after deducting the amount paid to one of them as an ordinary disability benefit.

Citations:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 12.

Other reference: 17 Op. Corp. Counsel 453.

PARTICIPATION BY NON-CIVIL SERVICE EMPLOYEE—RECEIVING PENSION AND SALARY AT SAME TIME

(No. 8028—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—April 24, 1933—2½ pp.*)

A former municipal employee who now holds a non-civil service position with the city is not entitled to participate in the Municipal Employees' Annuity and Benefit Fund, although he has a right to any annuity which has accrued because of his former participation in the fund.

The head of a department, in which is employed a person, who is receiving a pension or annuity from one of the municipal funds should be notified of the fact in order that the employee may be required to waive his annuity or pension during his period of employment, or surrender his position to some one who is not already receiving a pension or annuity.

Citations:

Statutes: Municipal Employees' Annuity and Benefit Fund act, secs. 1, 12, 42.

Other reference: Council Order concerning Waiver of Pension or Annuity, Coun. J. (1931-32), p. 349.

Opinion No. 7944 of February 16, 1933, to the Retirement Board of the Municipal Employees Annuity and Benefit Fund covers the same subject as the above opinion.

PARTICIPATION UPON RECLASSIFICATION IN THE SERVICE

(No. 8882—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—September 25, 1935—2½ pp.*)

Members of the Municipal Employees' Annuity and Benefit Fund whose positions are classified from skilled to unskilled employees remain members and participants in the fund without applying for membership.

Citations:

Statutes: Municipal Employees' Annuity and Benefit Fund act, sec. 12, 42 as amended (1929).

PARTICIPATION UPON RECLASSIFICATION IN THE SERVICE

(No. 8881—*Retirement Board, Municipal Employees' Annuity and Benefit Fund*—G. F. M.—September 25, 1935—1 p.)

A person who became a member of the Municipal Employees' Annuity and Benefit Fund by virtue of his civil service certification and who is reclassified or transferred by the Civil Service Commission to another position has the right to retain his status in the Municipal Employees' Annuity and Benefit Fund and to continue paying into the fund on the basis of his position as it was prior to such reclassification or transfer.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 12.

RESTORATION OF EMPLOYEE IN FUND

(No. 6538—*Retirement Board, Municipal Employees' Annuity and Benefit Fund*—J. W. B. and G. F. M.—November 7, 1929—4 pp.)

The restoration of an employee to the civil service list by cancellation of resignation or otherwise is deemed to be a restoration of the employee to membership in the Municipal Employees' Annuity and Benefit Fund, where the employee was a member of it prior to his separation from the service.

If the restored civil service employee has not made the payments necessary to retain his rights to ordinary disability benefit, he must submit to an examination by a physician designated by the Retirement Board, and if the report of the physician is unfavorable, he cannot be restored to membership or become a beneficiary of the ordinary disability benefit feature but can only be restored to such rights as are given in section 39(a), par. 3 of the Municipal Employee's Annuity and Benefit Fund act.

Where a person has been restored to membership in the fund upon his restoration to the civil service list, deductions for annuity purposes should have been made from his salary payments and paid into the fund in the same manner as prior to his resignation.

Citations:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 16, 17, 39, 47.

Case: Stiles v. Board of Trustees, 281 Ill. 636 (1918).

REENTRANCE TO SERVICE OF RESIGNED EMPLOYEE

(No. 8458—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—July 9, 1934—2 pp.*)

The pension law is separate and distinct from the Civil Service act.

A municipal employee who resigned from the service prior to December 31, 1921 and was later reinstated after January 1, 1922 is a "re-entrant," and he is not to be considered as a "present employee" or a "future entrant" under the terms of the Municipal Employees' Annuity and Benefit Fund act.

Citations:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 12, 36.
Case: Stiles v. Board of Trustees, 281 Ill. 636 (1918).

SERVICE CREDIT FOR TEMPORARY APPOINTMENT

(No. 6651—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—April 24, 1930—3 pp.*)

A person appointed from the civil service list to a position in the city or the Board of Education, which is not excluded from automatic participation in the Municipal Employees' Annuity and Benefit Fund by section 12 of the act establishing that fund, is entitled to have any period of temporary service, rendered by him between the date of his appointment to the position, and the date of his certification by the Civil Service Commission counted as a period of service for all purposes under the Municipal Employees' Annuity and Benefit Fund act, his certification merely having been delayed.

Citations:

Statutes: Municipal Employees' Annuity and Benefit Fund act, secs. 1, 12.
Civil Service act, sec. 10, 12.

CREDITS OF TEMPORARY EMPLOYEE

(No. 7005—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—July 13, 1931—2 pp.*)

By amendment to the Municipal Employees' Annuity and Benefit Fund act any temporary municipal employee is entitled to be credited with the full period of his service, salary deductions and city contributions in the Municipal Employees' Annuity and Benefit Fund during such temporary appointment after July 1, 1931; such credits

cannot be allowed where work under temporary authority occurred prior to July 1, 1931.

Citations:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 42, 54.

Cases: Richardson v. United States Mortgage and Trust Co., 194 Ill. 259 (1901-02).

Deininger v. McConnel, 41 Ill. 227 (1866).

Cleary v. Hoobler, 207 Ill. 97 (1904).

AGE AND SERVICE PAYMENTS BY TEMPORARY APPOINTEE

No. 7363—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—December 10, 1931—2½ pp.*)

A former participant in the Municipal Employees' Annuity and Benefit Fund who has been discharged from the service and then subsequently employed by the city under a temporary appointment, has no right to pay into the fund for age and service accumulations, nor has the Retirement Board any power to accept these payments.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 12, 42 (as amended July 1, 1931), 51.

PARTICIPATION BY TEMPORARY APPOINTEE

(No. 7373—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—December 14, 1931—1 p.*)

A civil service laborer who is a participant in the Municipal Employees' Annuity and Benefit Fund and who has become completely separated from the service, either by resignation or discharge, has no right to be a participant in the fund, even though employed by the city under a temporary appointment.

Opinion No. 8022 of April 20, 1933, to the Retirement Board, Municipal Employees' Annuity and Benefit Fund is in accord with the above opinion.

PARTICIPATION BY LABORERS

(No. 6616—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—March 8, 1930—2½ pp.*)

When the Municipal Employees' Annuity and Benefit Fund act provides how a person in the service of the city can become a beneficiary of the act, only that method can be used.

A laborer to become a beneficiary under the Municipal Employees' Annuity and Benefit Fund act must apply in writing to the Retire-

ment Board within six months from the date the act came into force, or within six months after the date on which he entered the service of the city.

When an employee, who held a position that automatically came under the benefits of the Municipal Employees' Annuity and Benefit Fund, enters a position where the procedure for participation in the fund is specifically provided, this procedure must be carried out in order for the employee to continue in the fund unless he has remained a participant.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 12.

Opinion No. 8299 of February 15, 1934, to the Retirement Board, Municipal Employees' Annuity and Benefit Fund is in accord with the above opinion.

PARTICIPATION BY LABORERS

(No. 6551—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—December 2, 1929—3 pp.)

Protection under the Municipal Employees' Annuity and Benefit Fund act for classified city laborers begins at the date of the filing of an application for inclusion under the act, regardless of the date of the meeting of the Retirement Board at which the application was approved, provided that the application was filed within six months after the laborer's entrance into the city's service. When the application is not filed within this six month period, the laborer is not entitled to the benefits of the Municipal Employees' Annuity Benefit.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 12.

LABORER'S RIGHTS IN FUND

(No. 6615—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—March 8, 1930—2 pp.)

A civil service laborer becomes a participant in the Municipal Employees' Annuity and Benefit Fund only by filing in writing within six months from the date of the certification under which he is employed an application to be included under the provisions of the act.

The fact that a civil service laborer has been certified previously as a section foreman and was automatically under the provisions of the Municipal Employees' Annuity and Benefit Fund act continues him as a participant in the Municipal Employees' Annuity and Benefit Fund when he ceases to be a section foreman and is later certified as a civil service laborer.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 12.

PARTICIPATION BY LABORER REENTERING THE SERVICE

(No. 8374—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—April 27, 1934—2 pp.*)

A municipal employee, classified in the labor service who failed to take advantage of the privilege to apply for membership in the Municipal Employees' Annuity and Benefit Fund within six months of entering the service, has no right to such privilege at any future time, even though he subsequently resigns, is re-examined, and is re-appointed.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 12.

PARTICIPATION BY LABORER REENTERING THE SERVICE

(No. 8331—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—March 14, 1934—2 pp.*)

Laborers who are discharged and later reinstated are not persons who are "appointed" under the Civil Service act, but are merely "re-instated" to the position which they originally held under that act. They are not to be classed as appointees applying, within six months of their appointment, for participation in the Municipal Employees' Annuity and Benefit Fund and are not entitled to membership by virtue of the reinstatement.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 12.

LABORER'S RIGHTS UPON REENTERING THE SERVICE

(No. 6614—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—March 8, 1930—2 pp.*)

Once a laborer has complied with the provisions of the Municipal Employees' Annuity and Benefit Fund act, and has become a participant in the fund, if he subsequently resigns or takes a leave of absence and then reenters the service, he need not thereafter ever again apply for participation in the fund, but has the same right to the benefits of the act as has any other municipal employee re-entering the service.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 12, 34.

Opinion No. 6429 of May 9, 1929, to the Retirement Board of the Municipal Employees' Annuity and Benefit Fund covers the same subject as the above opinions.

(2) *General Rights*

**SALARY BASIS FOR FUND PURPOSES—COMPUTATION OF
DUTY DISABILITY BENEFITS**

(No. 8701—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—March 13, 1935—2 pp.)

Annual salaries of municipal employees which exceed \$3,000 are considered as being \$3,000 for the purposes of the Municipal Employees' Annuity and Benefit Fund act.

Duty disability benefits granted to employees in the same rank and grade, doing the same work and receiving the same pay must be equal in amount.

A duty disability benefit is computed on the basis of the salary attached to his position at the time the employee is injured or on the basis of the salary attached to that position on July 1, 1931, whichever is higher.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 12, 46, 57½.

ANNUITY CREDIT FOR PERIOD OF ILLEGAL DISCHARGE

(No. 6648—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—April 23, 1930—3 pp.)

A discharged municipal employee who has been restored to his position by a court order is entitled to be credited for annuity and duty disability purposes with the entire period of time which elapses between the date of his discharge and the date of the court order reinstating him.

It is the duty of the proper officers to deduct from the employee's salary for the above period for annuity and similar purposes, and, if they fail to do so, the employee may pay those deductions into the fund.

Citations:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 10.
Other reference: Op. Corp. Counsel (1923-24), p. 302.

SERVICE CREDITS FOR FIRE SERVICE

(No. 6710—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—July 9, 1930—3½ pp.*)

A present municipal employee, who was employed in the city's Fire Department on December 31, 1921, and subsequently, is now entitled to be classed as a "present employee" under the Municipal Employees' Annuity and Benefit Fund act. His service in the Fire Department is counted as if such service were rendered as a municipal employee, and he is entitled to prior service credits and service credits for annuity and benefit purposes for the time served in the Fire Department.

The above employee cannot recover salary deductions paid into the Firemen's Pension Fund and cannot contribute to the Municipal Employees' Annuity and Benefit Fund the amount that would have been deducted had he been working as a municipal employee nor can the city contribute to this fund for that period of service in the Fire Department.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 19(b), 42.

SERVICE CREDITS UPON REENTRY, REFUND OF SALARY DEDUCTIONS UPON RESIGNATION

(No. 8169—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—September 7, 1933—1½ pp.*)

An employee who resigns from the service has the right to have the period of his past service counted for the purpose of computing the term of his service in the event he subsequently reenters the service before attaining the age of sixty-five years and becomes a contributor to and beneficiary of the Municipal Employees' Annuity and Benefit Fund.

Refunds of salary deductions from Municipal Employees' Annuity and Benefit Fund should not be made to a resigned employee until thirty days have elapsed after the date of filing his resignation and such resignation has not been withdrawn.

A resignation of a civil service employee may be withdrawn at any time within thirty days after the resignation has been filed.

Refunds of salary deductions for the Municipal Employees' An-

nuity and Benefit Fund may be made only after an employee has resigned or is discharged from the service.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 39(a), par. 3.

SERVICE CREDITS OF TEMPORARY APPOINTEES

No. 8240—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—December 14, 1933—2½ pp.)

The term of service rendered by a municipal employee under the Municipal Employees' Annuity and Benefit Fund act prior to January 1, 1922, includes any period of time during which the employee worked for the city, beginning with date when he was first appointed to the service and including all periods of service up to January 1, 1922, but excluding any periods of resignation or discharge from the service.

The Municipal Employees' Annuity and Benefit Fund excludes temporary appointees from credit for services rendered after January 1, 1922.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 12, 51.

SERVICE CREDITS WHILE ON ELIGIBLE LIST

(No. 6948—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—June 12, 1931—2½ pp.)

A municipal employee is entitled to only such credits for service as are granted by section 51 of the Municipal Employees' Annuity and Benefit Fund act. No credit can be granted for any period of time that the employee is on the eligible list, unless it be while the employee is on leave of absence. In that event he is entitled to the credits provided in section 51 computed according to the provisions of section 40.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 40, 51, 57.

SERVICE CREDITS PRIOR TO TRANSFER TO FIRE SERVICE

(No. 7256—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—November 5, 1931—2 pp.*)

An employee who was formerly classified as a municipal employee but who was subsequently classified in the Fire Department and who has allowed his accumulations to remain in the Municipal Employees' Annuity and Benefit Fund, not exercising his right under section 39, is entitled to service credit in that fund until the date of change in the classification, provided that no credit is given to him for any period during which he has failed to make proper contributions unless he makes up any such deficiency.

Citations:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 39.

Other reference: Opinion No. 6676 (this volume, p. 237).

SERVICE CREDITS UPON RESIGNATION

(No. 7646—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—July 12, 1932—1½ pp.*)

A refund of contributions to the Municipal Employees' Annuity and Benefit Fund is payable to an employee only upon complete separation from the service, and an employee whose resignation is cancelled, but who received such refunds in error, must repay them before he is entitled to a service credit in the Municipal Employees' Annuity and Benefit Fund for the period prior to his resignation.

EFFECT OF WITHDRAWAL OF SALARY DEDUCTIONS

(No. 7226—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—October 28, 1931—1½ pp.*)

A municipal employee who withdraws the salary deductions to his credit in the Municipal Employees' Annuity and Benefit Fund, by this act, surrenders and forfeits all rights to any annuity or other benefits from the Municipal Employees' Annuity and Benefit Fund, but he retains the right to have any such period of service counted as service for the purpose of computing his term of service in the event that he shall subsequently reenter the fund before he shall attain the age of sixty-five years.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 39.

Opinion No. 7221 of October 27, 1931, to the Retirement Board, Municipal Employees' Annuity and Benefit Fund is in accord with the above opinion.

REFUND OF SALARY DEDUCTIONS UPON SEPARATION FROM SERVICE

(No. 8093—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—June 12, 1933—2½ pp.*)

Refunds under the Municipal Employees' Annuity and Benefit Fund act are payable only after the municipal employee has completely severed his connection with the city service, either by resignation or discharge.

A municipal employee whose position has not been appropriated for, is not to be considered as completely severed from the city service, since his name is restored to the eligible list or the reinstatement list for reappointment.

SALARY DEDUCTIONS AND CONTRIBUTIONS UPON TRANSFER FROM FUND

(No. 7668—*Clerk, Municipal Employees' Annuity and Benefit Fund—G. F. M.—July 27, 1932—1½ pp.*)

Contributors to the Municipal Employees' Annuity and Benefit Fund who, by reason of transfer or otherwise, cease to be participants in the fund, are entitled to a refund of the contributions made by them to the fund, but are not entitled to any part of the city contributions, or monies raised by taxation.

Monies raised by taxation cannot be transferred from the Municipal Employees' Annuity and Benefit Fund to another similar fund for the credit of municipal employees who have become participants in such other fund.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 11.

REFUND OF SALARY DEDUCTIONS UPON SEPARATION FROM SERVICE—WIDOW'S ANNUITY

(No. 8193—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—October 17, 1933—4½ pp.*)

Any municipal employee, without regard to his period of service, who shall resign or be discharged from the service after January 1, 1922, before attaining the age of fifty-five, or who shall have served less than ten years at the time he resigns or is discharged from the service before attaining the age of sixty, shall have the right to a refund of all salary deductions accumulated to his credit for age and

service annuity and widow's annuity purposes on the date of his resignation or discharge from the service.

If salary deductions are not refunded to the employee prior to his death, they should be refunded to his estate.

The widow of a municipal employee who died while out of the service after he had resigned and before having attained an age of sixty years and before he served ten years, is not entitled to any annuity from the Municipal Employees' Annuity and Benefit Fund.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 38(d), 39(a, e).

REFUNDS UPON DEATH OF PENSIONER

(No. 7439—Retirement Board, *Municipal Employees' Annuity and Benefit Fund*—G. F. M.—February 3, 1932—4½ pp.)

Where the total amount contributed to the Municipal Employees' Annuity and Benefit Fund by a pensioner was less than the amount due from the pensioner as contributions under the Municipal Employees' Pension act of 1911, no refund is payable to the pensioner's heirs as the pensioner was indebted to the fund at the time of his death, and had no contributions to be refunded.

Citation:

Statute: Municipal Employees' Pension Fund act (1911), secs. 7, 9.

DISABILITY PENSIONER WITH UNPAID BALANCE DUE FUND

(No. 8880—Retirement Board, *Municipal Employees' Annuity and Benefit Fund*—G. F. M.—September 24, 1935—3 pp.)

When a person who has been receiving a disability pension under the Municipal Employees' Pension act dies leaving an unpaid balance due that fund, there is nothing refundable to his heirs.

Disability pensioners must pay interest on an unpaid balance due the Municipal Employees' Pension Fund just as age and service pensioners must.

Citation:

Statute: Municipal Employees' Pension Fund act (1911) secs. 7, 9, as amended.

AMOUNT OF REFUND OF SALARY OF DECEASED PENSIONER

(No. 8612—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—January 4, 1935—4 pp.*)

A refund should be made of salary deductions of a deceased annuitant of an amount equal to the difference between the total sum of all his salary deductions made for "annuity purposes" plus interest to the date his annuity payments began and the entire amount paid to him in the form of annuity, where there is no widow entitled to annuity.

Citations:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 28, 39, 39(e).

Other reference: Op. Corp. Counsel (1925-26), p. 322.

REFUNDS DUE DECEASED EMPLOYEE WHO LEFT A WILL

(No. 8144—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—August 16, 1933—2½ pp.*)

A refund of salary deductions of a deceased employee from the Municipal Employees' Annuity and Benefit Fund cannot be paid, where said employee has left a will, until the will is filed for probate and probate either granted or refused. If probate is granted, then such refunds are payable to the executor; if probate is not granted and no administrator is appointed, then the refunds should be paid in accordance with the Municipal Employees' Annuity and Benefit Fund act.

The mother of minor children cannot waive, release, assign or transfer property or property rights of such children without an appropriate order of the Probate Court.

Citations:

Statutes: SH '33, 148: 14.

Municipal Employees' Annuity and Benefit Fund act, secs. 39(e), 60.

REFUND OF SALARY DEDUCTIONS TO ADOPTED CHILD

(No. 6523—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—October 9, 1929—2½ pp.*)

An adopted child of a deceased municipal employee is to be considered a child of the employee for purposes of refund within the meaning of the Municipal Employees' Annuity and Benefit Fund act, upon proper proof of the adoption.

The brother of a deceased employee is not entitled to any part of a refund under the Municipal Employees' Annuity and Benefit Fund act, if the deceased left a legally adopted child surviving him.

Citations:

Statutes: SH '27: p. 97. (An act to revise the law regarding the adoption of children, sec. 5).
Municipal Employees' Annuity and Benefit Fund act, sec. 39.

REFUNDS DUE HEIRS OF DECEASED EMPLOYEE

(No. 8528—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—October 18, 1934—1½ pp.)

Where there is a dispute as to the identity of heirs of an estate to which refunds from the Municipal Employees' Annuity and Benefit Fund are due, these refunds should be made only to the heirs proven to be such in the Probate Court or to such heirs as have secured a release from other possible contesting heirs of any claim or interest in the refunds.

PAYMENT OF FUNERAL EXPENSES FROM REFUNDS

(No. 8235—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—December 11, 1933—2 pp.)

The Retirement Board of the Municipal Employees' Annuity and Benefit Fund may pay the reasonable burial expenses of a deceased municipal employee from the refund due the estate of that employee, if there is no administrator or executor, and any money remaining after the payment of those burial expenses should be paid to the heirs of the deceased employee as provided by law.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 39.

DISTRIBUTION OF SALARY DEDUCTION REFUNDS OF DECEASED EMPLOYEE

(No. 7287—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—November 12, 1931—3½ pp.)

Where a municipal employee died before July 1, 1931, his salary deductions which are subject to be refunded, should be distributed in accordance with the provisions of section 39 (e) of the Municipal

Employees' Annuity and Benefit Fund as they were prior to the amendment of July 1, 1931.

Citations:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 39(e), as amended July 1, 1931.

Cases: Fowler v. Johnston City, 292 Ill. 440 (1920).
Otis Elevator Co. v. Industrial Commission, 288 Ill. 396 (1919).
People v. Greer, 43 Ill. 213 (1866-67).
Kehl v. Taylor, 275 Ill. 346 (1917).
Bruce v. Schuyler, 9 Ill. 221 (1847).

**MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND,
EFFECT OF AMENDMENT TO SECTION 39 (E)**

(No. 7294—*Retirement Board, Municipal Employees' Annuity and Benefit Fund*—G. F. M.—November 13, 1931—1 p.)

The amendment to section 39 (E) of the Municipal Employees' Annuity and Benefit Fund did not affect any rights existing at the time the amendment came into force and effect.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 39(e).

REFUND OF CONTRIBUTIONS OF MINOR

(No. 6999—*Retirement Board, Municipal Employees' Annuity and Benefit Fund*—G. F. M.—July 9, 1931—2 pp.)

Any municipal employee who contributed to the Municipal Employees' Pension Fund while a minor and prior to the exclusion of minors from the fund by an amendment to the Municipal Employees' Pension Fund act, is not entitled to be paid a refund of his contributions.

A legislative enactment is not retroactive in operation unless it is specifically declared that it shall be retroactive.

Salary deductions or contributions to a pension fund are not the property of the contributor after their payment into the pension fund.

Citations:

Cases: Deininger v. McConnel, 41 Ill. 227 (1866).

Richardson v. United States Mortgage and Trust Co., 194 Ill. 259 (1901-02).

Hughes v. Traeger, 264 Ill. 612 (1914).

Pecoy v. Chicago 268 Ill. 78 (1915).

PARTICIPATION IN REFUNDS BY GRANDCHILD

(No. 8065—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—May 16, 1933—1½ pp.*)

The only child of a deceased son of a deceased contributor to the Municipal Employees' Annuity and Benefit Fund should share equally with the surviving children of that deceased contributor in the refund of her accumulations in the Municipal Employees' Annuity and Benefit Fund.

Citations:

Statutes: Municipal Employees' Annuity and Benefit Fund act, sec. 39(e).
SH '31, 39: 1.

REFUND OF SALARY DEDUCTIONS TO CHILD IF NO WIDOW SURVIVES

(No. 7110—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—September 2, 1931—1½ pp.*)

A minor who is not entitled to a child's annuity because the deceased parent served the city less than four years is entitled to a refund of the salary deductions of such parent from the Municipal Employees' Annuity and Benefit Fund if no widow survives; if such refund is less than \$100.00, it should be paid to the person standing in the position of *loco parentis* to the child.

Citations:

Statutes: Municipal Employees' Annuity and Benefit Fund act, sec. 39(e).
SH '29, 64: 2.

REFUND TO LABORER PARTICIPANT WHO RESIGNS

(No. 6642—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—April 17, 1930—3 pp.*)

An employee in the labor service of the city who has served less than ten years and who was not sixty years old when he resigned is entitled to a refund of his salary deductions made for age and service annuities and widow's annuity. When such a person reenters the service without having received that refund, that refund should be made less deductions which were not made from the salary he earned after his reentry into the service.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 12, 34, 39(a-1, a-2).

(3) *Specific Benefits—Retirement*

PAYMENT OF ANNUITY TO CONSERVATOR

(No. 7248—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—November 3, 1931—2 pp.*)

The Retirement Board of the Municipal Employees' Annuity and Benefit Fund has no power to ignore a conservator already appointed by the court; the board must make annuity payment to a duly appointed conservator when one exists.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 60, as amended (1931).

RESIDENCE REQUIREMENT FOR RETIREMENT ANNUITY

(No. 7051—*G. F. M.—August 3, 1931—1 p.*)

An annuitant of the Municipal Employees' Annuity and Benefit Fund may establish his residence wherever he sees fit and still be entitled to be paid his annuity.

ANNUITY PAYMENTS AFTER REENTRY INTO THE SERVICE

(No. 6855—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—March 30, 1931—1½ pp.*)

An annuitant of the Municipal Employees' Annuity and Benefit Fund who reenters the service is not entitled to be paid, to receive, or to retain any amount paid to him by way of annuity, when such amount falls due and is paid on a date subsequent to the date of his reentry into the service.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 34(a), 34(b).

DETERMINATION OF FUTURE ANNUITY RIGHTS

(No. 6658—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—April 30, 1930—2 pp.*)

The future annuity rights of an employee at the time he may attain the age of fifty-five years cannot be determined until that age is attained, and the status of the law at that time is established.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 49, 57.

PAYMENT OF UNCOLLECTED ANNUITY UPON DEATH OF ANNUITANT

(No. 7530—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—April 7, 1932—3½ pp.*)

The estate of a deceased municipal employee is entitled to receive and to be paid all uncollected annuity payments which were due and payable to the deceased at the time of his death and which he would have received, or have been entitled to receive, had he applied for them during his lifetime.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 12, 16, 26(c), 28, 29(b), 51, 60.

ANNUITY PAYMENTS AFTER ANNUITANT'S DEATH

(No. 8439—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—June 22, 1934—2 pp.*)

Where a municipal employee resigned when he was past sixty-five years of age and died before making an application for the payment of an annuity, such annuity covering the period from the date of resignation to the date of death is payable as provided by statute: (1) to the executor or administrator of his estate if such is appointed; or (2) according to the laws of descent if no executor or administrator is appointed.

Citations:

Statutes: Municipal Employees' Annuity and Benefit Fund act, sec. 31. SH '33, 39: 1.

COMPUTATION OF SALARY BASE FOR FUND

(No. 7658—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—July 21, 1932—2 pp.*)

The annual salary of municipal employees, including Board of Education employees whose salary or wage is arranged upon other than an annual basis must be computed for annuity or benefit purposes according to the schedule provided in the act governing the Municipal Employees' Annuity and Benefit Fund, of which one section provides that in computing the annual salary of a monthly wage, twelve times the monthly rate should be taken.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 40.

ANNUITY RIGHTS OF POLICE DEPARTMENT EMPLOYEE PARTICIPATING IN FUND

(No. 8911—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—November 6, 1935—1½ pp.)

An ambulance or police surgeon who has been a contributor to the Municipal Employees' Annuity and Benefit Fund and the Municipal Employees' Pension Fund of 1911, who has never availed himself of the right to participation in the Policemen's Annuity and Benefit Fund and who cannot now do so because of separation from the service, is entitled to an annuity from the Municipal Employees' Annuity and Benefit Fund to which his total contributions and accumulations therefrom entitle him.

SERVICE CREDITS FOR LEAVE OF ABSENCE

(No. 6659—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—April 30, 1930—3 pp.)

In computing for annuity purposes the term of service of a municipal employee, the period of leave of absence without pay not longer than ninety days, and the period for which the employee shall receive a disability benefit, are to run concurrently when equal in extent.

A municipal employee, who has attained the age of sixty-five, who has been receiving a duty disability benefit, and who has had a leave of absence for one year, is entitled, if he does not resign or is not discharged, to have counted for annuity purposes as periods of service all periods of leave of absence after the termination of his disability which are not longer than ninety days each.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 46, 51 (par. 3).

ANNUITY OF DISABLED EMPLOYEE RETIRING BEFORE AGE OF FIFTY-FIVE

(No. 7114—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—September 3, 1931—2 pp.)

A municipal "present employee" who served more than twenty years and whose period of disability payments expired while still disabled and before attaining the age of fifty-five, is entitled, after discharge or retirement, to such annuity as his age and service annuity

accumulations will purchase for him until he reaches the age of fifty-five and a minimum annuity of \$600.00 a year thereafter.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 49, 57.

Opinion No. 7111 of September 3, 1931 to the Retirement Board, Municipal Employees' Annuity and Benefit Fund is in accord with the above opinion.

COMPUTATION OF ADDITIONAL ANNUITY—SERVICE CREDITS WHILE EMPLOYEE OF ANNEXED TERRITORY

(No. 8884—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—September 26, 1935—3 pp.)

In certain cases, as provided in section 57 of the act, a participant in the Municipal Employees' Annuity and Benefit Fund having thirty-five or more years of service and being sixty-five or more years of age at time of separation from the service, should have additional annuity computed on the basis of the highest actual compensation appropriated for any position held by him by virtue of civil service examination and certification during any period of his service with the city. Any compensation paid to him during any period of time that he served as a temporary appointee cannot be considered as a basis for fixing his annuity.

A participant in the Municipal Employees' Annuity and Benefit Fund is entitled to be credited with any period of time he served as an employee of a territory which was annexed to the city before the Municipal Employees' Annuity and Benefit Fund act came into effect.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 12, 14, 42, 51, 57 (as amended, 1935).

AMOUNT AND BASIS OF PRIOR SERVICE ANNUITY

(No. 8962—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—December 10, 1935—3½ pp.)

The amount credited for prior service annuity purposes to all persons who have retired or may retire subsequent to July 1, 1923, must be computed on the basis of the salary of the position held by the municipal employee concerned by virtue of civil service on January 1, 1922.

The amount credited for prior service annuity purposes for any person who retired prior to July 1, 1923, was properly computed on the basis of the salary of the municipal employee concerned as such salary was on December 31, 1921.

All pensions and annuities must be computed and allowed under

the law as it exists at the time of the happening of the event upon which the pension or annuity depends.

Citations:

Statutes: Ill. Laws (1921), p. 214 (Municipal Employees' Annuity and Benefit Fund act, secs. 6(j), 14 as amended, 1923).

Cases: Hughes v. Traeger, 264 Ill. 612 (1914).
Pecoy v. Chicago, 265 Ill. 78 (1915).

(4) Specific Benefits—Disability

SALARY DEDUCTIONS WHILE WORKING FOR CIVIL WORKS ADMINISTRATION

(No. 8306—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—February 17, 1934—2 pp.)

Municipal employees who are contributors to and participants in Municipal Employees' Annuity and Benefit Fund and who have taken a leave of absence or who have been laid off so that they might work for the Civil Works Administration, are not entitled to pay into the fund any amount for annuity purposes during these periods of leave of absence or lay-off, but they can pay contributions to protect their ordinary disability benefit rights. Moreover, these Civil Works Administration employees cannot receive a duty disability benefit if injured while in such employ as the injury was not received in the performance of an act of duty but during a leave of absence or lay-off.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 42, 47.

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion as to the right of Civil Works Administration employees to pay into your fund, the following is submitted:

Some municipal employees, contributors to and participants to your fund, have taken leaves of absence or have been laid off for the purpose of enabling them to engage in work for and under the Civil Works Administration. The only provision in your act permitting payment into your fund by a municipal employee for annuity purposes during a period of time that he is not performing the duties of his civil service position in the service, is found in section 42 of the act. This section provides that whenever any municipal employee shall be assigned to work for the city or Board of Education in any position other than the position which he holds by virtue of certification and appointment as a result of competitive civil service examination, such municipal employee shall have deducted from his salary the amount that would have been deducted had he continued in the position which he held by virtue of such certification and appointment, or in the event such deductions shall not be made, through inadvertance or otherwise, such municipal employee shall have the right to pay such amount into your fund, and shall be credited in his account with the corresponding city deductions. This section deals only with participants in your fund assigned to work for the city or Board of Education by virtue of temporary appointment, and are thus temporarily transferred from their regular civil service positions to

some temporary positions in the service of the city or Board of Education. The Civil Works Administration employees are not "temporary appointees" within the meaning of the act, nor have they been assigned to work for the city or Board of Education but are working under the direction, supervision and control of the federal government. While they may be working on city projects, they are being paid by the government.

The only contributions the employees in question can pay into your fund are the contributions payable for ordinary disability benefit purposes. These contributions are payable under the provisions of section 47 of your act.

I am of the opinion that a municipal employee, contributor to and participant in your fund, who has taken a leave of absence or has been laid off for the purpose of working for the Civil Works Administration is not entitled to pay into your fund any amount for annuity purposes during such period of leave of absence or lay-off. I am of the further opinion that such employee would not be entitled under your act to any duty disability benefit as a municipal employee injured in the performance of an act or acts of duty during such period of time. I am further of the opinion that such employee has a right to pay into your fund contributions for the purpose of protecting his rights under the ordinary disability benefit section of your fund.

DEDUCTIONS FOR WORKMEN'S COMPENSATION AWARDS

(No. 7590—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—June 1, 1932—5½ pp.)

The only awards of the Industrial Board under the Workmen's Compensation act to an injured municipal employee which should be deducted from disability benefits paid to him from the Municipal Employees' Annuity and Benefit Fund are awards for the same disability.

The only thing for which both the Industrial Board and the Retirement Board of the Municipal Employees' Annuity and Benefit Fund make the same award is for incapacity to perform the duties of a position in the service.

Citations:

Statutes: SH '31, 48: 142, 145 (e).
Municipal Employees' Annuity and Benefit act, secs. 12, 48.

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion as to whether or not an award by the Industrial Board for a specific loss, in addition to the award for temporary incapacity for work, is to be deducted from any disability benefit granted by your board, the following is submitted:

Your letter states that William H. Clark, electrician, Bureau of Engineering, applied for duty disability benefit under date of December 11, 1931, claiming to have injured his eye while on duty on September 14, 1931; that he continued to work until November 4, 1931, and was paid fifteen days' sick leave on December 8, 1931; that at the January meeting of your board he was granted disability benefit pending disposition of his claim before the Industrial Board; that the Industrial Board allowed him \$15.00 per week for seven weeks, that being the period of his temporary total incapacity

for work; that the Industrial Board also allowed him the sum of \$15.00 per week for the further period of one hundred twenty weeks for the reason that the injury sustained caused the complete loss of his left eye; that your board desires an opinion defining section 48 of your act in connection with deductions to be made from his disability benefits.

Section 48 of your act reads as follows:

"If any municipal employee, who shall be disabled, shall receive any compensation from such city on account of such disability under and by virtue of the law known as the Workmen's Compensation act, the disability benefit herein provided for such municipal employee shall be reduced by an amount so received, if such amount shall be less than the amount of such benefit; and if the amount or amounts received as compensation exceed the amount of the disability benefit herein provided for such municipal employee, such municipal employee shall not receive any such disability benefit until a period of time during which said benefit, payable at the rate herein stated, would equal the amount of such compensation shall have expired. In calculating any such period of time, interest upon the amounts of money involved shall not be considered."

It will be noted that there is to be deducted from any disability granted a municipal employee any compensation received from the city "on account of such disability" under and by virtue of the Workmen's Compensation act. Section 8 (e) of the Workmen's Compensation act (Smith's Rev. Statutes 1931, p. 1441) provides that for the injuries scheduled in the said paragraph, the municipal employee shall receive compensation for the period of temporary total incapacity for work resulting from such injury, and shall receive in addition thereto, "compensation for a further period * * * for the specific loss" therein mentioned. Then there follows in the said paragraph a long list of specific losses, including, as number sixteen of the said schedule, the loss of the sight of an eye, or the permanent and complete loss of its use. This award for a specific loss is denominated "compensation." In addition to these two kinds of compensation there is a third class of award which is denominated "compensation," namely, compensation for a serious and permanent disfigurement which is provided for in paragraph 8 of the act. It would therefore appear that the Workmen's Compensation act provides compensation for incapacity for work disfigurement and specific loss.

Section 5 of the Workmen's Compensation act (Smith's Rev. Stat., 1931, p. 1424) provides that:

"Any such employee * * * who is * * * entitled to receive a pension or benefit for or on account of disability * * * arising out of, or in the course of, his employment, from a pension or benefit fund to which the state or any * * * municipal corporation therein is a contributor, in whole or in part, shall be entitled to receive only such part of such pension or benefit as is in excess of the amount of compensation recovered and received by such employee * * * under this act."

It will be noted that section 48 hereinabove referred to uses the following language: "If any municipal employee who shall be disabled shall receive any compensation from such city on account of such disability, etc.," and the phrase "such disability" necessarily refers to the disability for which disability benefit is payable under the Municipal Employees' Annuity and Benefit Fund act. Section 12 of the latter act, so far as it is here involved, reads as follows:

"Section 12: The following words and terms as used in this act shall mean as follows, respectively:

"Disability: A condition of physical or mental incapacity on the part of a municipal employee to perform the duties of his position in the service."

Transferring the definition of disability into the quoted paragraph of section 48, section 48 would read as follows:

"If any municipal employee who shall be disabled shall receive any compensation from such city on account of such condition of physical or mental incapacity on the part of the municipal employee to perform the duties of his position in the service, under and by virtue of the law known as the Workmen's Compensation act, the disability benefit herein provided for such municipal employee shall be reduced by an amount, etc."

It would appear that it is the intention of the Municipal Employees' Annuity and Benefit Fund act that there shall be deducted from any disability benefit, payable under such act, only such proportion of the compensation paid to such employee under the Workmen's Compensation act as is payable because of the employee's condition of physical or mental incapacity to perform the duties of his position in the service.

As against this provision it will be seen that section 5 of the Workmen's Compensation act, hereinabove quoted, contains no such limiting language, but provides that the employee shall receive only such part of his disability benefit as is in excess of the compensation recovered and received. No distinction is made in the act as to the nature of the compensation which is to be considered or dealt with.

While there appears to be a conflict between the two acts as to whether the entire workmen's compensation awarded is to be set off against any disability benefit, or as to whether there is to be set off only that portion of the compensation which is awarded for the period of temporary total incapacity for work resulting from an injury, the solution of the difficulty seems to lie in construing section 5 of the Workmen's Compensation act as referring to disability as defined in your act. The disability defined in your act is the only disability for which a benefit is granted under your act, and consequently, when the Workmen's Compensation act refers to a disability for which a benefit is granted under your act and for which compensation is also granted under the Workmen's Compensation act, the latter act must refer to the particular compensation which is granted for the same thing for which your act allows a benefit, namely, incapacity to perform the duties of his position in the service. This would seem all the more reasonable when it is considered that there does not appear to be any reason or sense in deducting from a benefit allowed to an employee because of his physical or mental incapacity to perform the duties of his position in the service, money which has been allowed him as compensation for a serious or permanent disfigurement, which latter would in no way interfere with his ability to work. The purpose of the disability benefit provided for in your act is to enable a municipal employee to be supported in some measure during a period of incapacity for service, and for your board to deduct from such maintenance the monies awarded to the employee because such employee was disfigured would be a mere absurdity and not within the apparent intention of either your act or the Workmen's Compensation act.

If, then, the compensation for disfigurement is not to be deducted, as it apparently is not, it is evident that the "compensation" referred to in section 48 of your act does not include all forms or classes of workmen's compensation, but must have reference to some specific compensation. This latter must therefore be the compensation awarded for the same thing for which disability benefit is granted.

In cases in which the injury is of such a character as to render the employee incapable of performing his duties in the service because of a resulting mental or physical condition, as the loss of an arm, a leg, sanity, etc., and this incapacity is the foundation for an award for a specific loss under the Workmen's Compensation act and also the foundation of a grant of disability benefit under your act, it would seem that such award for specific loss should be construed as included within the intent of the phrase "any

compensation * * * on account of such disability" as used in section 48. In cases in which the injury for which a specific loss award is granted is not an injury which renders the employee incapable of performing his duties in the service, such specific loss should not be construed to be a compensation to be deducted from disability benefits.

I am of the opinion that the "compensation" referred to in section 48 of your act, and in section 5 of the Workmen's Compensation act, refers to compensation awarded for temporary total incapacity for work and also to compensation awarded for a specific loss where the mental or physical condition which is the basis of such specific loss award is a condition which renders the employee incapable of performing the duties of his position in the service.

DEDUCTIONS FOR WORKMEN'S COMPENSATION PAYMENTS

(No. 8274—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—January 15, 1934—2 pp.)

The Retirement Board of the Municipal Employees' Annuity and Benefit Fund may deduct from duty disability benefit payments to an employee only such an amount as is paid to the employee under the Workmen's Compensation act on account of the same disability.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 48.

DEDUCTIONS FOR WORKMEN'S COMPENSATION WHICH IS NOT GRANTED

(No. 8617—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—January 9, 1935—2½ pp.)

Where a municipal employee has been granted a duty disability benefit and a deduction of workmen's compensation has been made in anticipation of his securing such an award, and subsequently the employee is denied compensation due to his delay in filing, the deductions of anticipated compensation should be returned to him.

Citations:

Statutes: Municipal Employees' Annuity and Benefit Fund act, secs. 11, 48.

Workmen's Compensation act, sec. 24.

REQUIREMENT FOR DUTY DISABILITY AWARD

(No. 7006—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—July 13, 1931—3 pp.)

Any injury occurring in the course of and arising out of the actual work of a municipal employee, as an injury on city property while

opening the door of a city shop, is an injury occurring in the performance of an act of duty and such employee is entitled to duty disability benefits from the Municipal Employees' Annuity and Benefit Fund.

Any disabled municipal employee, who receives compensation for disability from the city under the Workmen's Compensation act, shall have his disability benefit reduced by the amount so received.

Citations:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 46
48.

Case: People v. Retirement Board, 326 Ill. 579 (1928).

COMPUTATION OF DUTY DISABILITY BENEFITS

(No. 8707—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—March 13, 1935—2 pp.)

A duty disability benefit is computed on the basis of the salary attached to the position held by the employee at the time of his injury, or on the basis of the salary attached to that position on July 1, 1931, whichever is higher. The salary of the position held by the employee on July 1, 1931, if the position is different from the position he held at the time of his injury, has no effect on the computation.

Duty disability benefits must be equal for all employees of the same grade, doing the same work, and receiving the same salary.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 46,
57½.

Opinions No. 8702, 8703, 8704 and 8705, all of March 13, 1935, to the Retirement Board, Municipal Employees' Annuity and Benefit Fund, are in accord with the above opinion.

COMPUTATION OF DUTY DISABILITY BENEFITS

(No. 8708—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—March 13, 1935—2 pp.)

When the amount of salary appropriated for a position is for a definite period of less than twelve months, a duty disability benefit is to be computed upon the basis of the daily compensation figured at 1/365th of the amount so appropriated, the amount so appropriated being treated as \$3,000 per year if in excess of \$3,000.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 57½.

COMPUTATION OF DUTY DISABILITY BENEFITS AND CHILD'S DISABILITY BENEFITS

(No. 8710—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—March 14, 1935—3 pp.*)

A duty disability benefit should be seventy-five per cent of the salary of the position held by an employee at the time of his injury or seventy-five per cent of the salary of that position on July 1, 1931, whichever is higher, regardless of whether the benefit, if calculated on the basis of the salary of that position on July 1, 1931, exceeds ninety per cent of the salary the employee was receiving at the time of his injury.

When the duty disability benefit received by an employee is less than ninety per cent of his salary at the time of his injury, he may be allowed a child's disability benefit of an amount that will make the total of his duty disability benefit and his child's disability benefit equal to ninety per cent of the salary he was receiving at the time of his injury, but if the amount of his duty disability benefit equals or exceeds ninety per cent of his salary at the time of his injury, he is not entitled to receive a child's disability benefit.

Citations:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 46, 57 $\frac{1}{2}$.

Other reference: Opinion No. 8691 (this volume, p. 274).

COMPUTATION OF CHILD'S DISABILITY BENEFIT

(No. 8691—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—March 5, 1935—3 pp.*)

In computing a child's disability benefit, the actual salary of the injured employee at the time of his injury should be used as the base, and if the child's disability benefit, when added to the injured employee's duty disability benefit exceeds ninety per cent of the employee's actual salary at the time of his injury, it should be reduced to such an amount that when added to the employee's duty disability benefit the sum will not exceed ninety per cent of the employee's salary at the time of his injury.

The actual salary used as a base for computing a child's disability benefit should not exceed an annual salary of \$3,000.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 46, 57 $\frac{1}{2}$.

COMPUTATION OF DUTY DISABILITY BENEFIT IN CASE OF VARICOSE VEINS

(No. 6751—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—August 13, 1930—3 pp.*)

When varicose veins of a municipal employee existed prior to the occurrence of an injury and contributed to the physical condition following that injury, the employee is entitled to only a fifty per cent. duty disability benefit during any recurrences, but if the varicose veins are the result of the injury occurred, he is entitled to a seventy-five per cent disability benefit during any recurrences.

The duty disability benefit is subject to a reduction by an amount equal to any sum paid to the employee under the Workmen's Compensation act.

Citations:

Statutes: Municipal Employees' Annuity and Benefit Fund act, sec. 46.
SH '29, ch. 48 (Workmen's Compensation).

EFFECT OF DATE OF ENTRY INTO SERVICE ON DUTY DISABILITY RIGHTS

(No. 8709—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—March 13, 1935—3 pp.*)

The right of a municipal employee to receive a duty disability benefit based on his salary at the time of his injury or on the salary of that position on July 1, 1931, whichever is higher, is not affected by the date of his entry into the service.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 46, 57½.

MEDICAL EXAMINATION FOR ORDINARY DISABILITY BENEFITS

(No. 7250—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—November 3, 1931—1½ pp.*)

An ordinary disability benefit under the Municipal Employees' Annuity and Benefit Fund act is not to be allowed unless evidence of the claimed disability is secured through a medical examination of the employee in support of his claim, irrespective of the time in which this claim may be filed.

Citations:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 1, 47.
Case: Colson v. Trustees, 287 Ill. 56, 61 (1919).

EFFECT OF SALARY CHANGE ON ORDINARY DISABILITY BENEFITS

(No. 8895—*G. F. M.*—October 15, 1935—1½ pp.)

Ordinary disability benefits received from the Municipal Employees' Annuity and Benefit Fund by a beneficiary are not affected by any action of the City Council which increases or decreases his salary as the benefit is based on the salary he received at the time his disability occurred.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 47.

TIME BASIS OF ORDINARY DISABILITY CONTRIBUTIONS AND AWARDS

(No. 6600—*Retirement Board, Municipal Employees' Annuity and Benefit Fund*—*G. F. M.*—February 11, 1930—3 pp.)

Ordinary disability benefit contributions are made on the basis of six months' periods and those contributions cannot be apportioned on the basis of fractional parts of any six months' period, nor can a refund be made of any such portion.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 39, 47.

(Note: The basis of contribution was changed by amendment in 1931.)

COMPUTATION OF SALARY DEDUCTIONS FOR ORDINARY DISABILITY

(No. 7726—*Retirement Board, Municipal Employees' Annuity and Benefit Fund*—*G. F. M.*—August 22, 1932—3½ pp.)

The salary of a municipal employee appropriated for on a yearly basis should be the basis of all computations for purposes of the Municipal Employees' Annuity and Benefit Fund, irrespective of the number of months during which any such employee may be employed to work.

The total amount to be contributed by an employee for ordinary disability purposes during a year should be so distributed among his salary payments as to result in each salary payment bearing a proportionate share of the entire annual contribution.

In computing disability payments, the yearly salary appropriated should be divided by 365 and the payments computed upon this daily compensation basis.

Citations:

Statute: Municipal Employees Annuity and Benefit Fund act, secs. 12, 46, 47.

Other reference: Opinion No. 7658 (this volume, p. 265).

REFUND OF AND BASIS OF COMPUTING ORDINARY DISABILITY CONTRIBUTIONS AND PAYMENTS

(No. 8717—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—March 14, 1935—4½ pp.)

Salary deductions under the Municipal Employees' Annuity and Benefit Fund act for ordinary disability benefits are not refundable as are deductions made for annuity purposes.

Ordinary disability benefit contributions are based on an assumed full annual salary or wage, whether the employee's name appears on the payroll throughout the entire year or not.

The salary upon which an ordinary disability benefit is computed should be the same as the salary upon which the contributions for the benefit were computed and paid in.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 40, 47, 57½.

FAILURE TO MAKE DEDUCTIONS FOR ORDINARY DISABILITY

(No. 7725—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—August 22, 1932—3 pp.)

Where an employee's name was on the payroll at the time deductions should have been made for the ordinary disability benefit under the Municipal Employees' Annuity and Benefit Fund and the payroll clerk failed to make the proper deductions from such salary payment; the amount of such payment should be charged in the account of such employee and deducted from any monies payable to him by way of pension, annuity, disability benefit or refund.

Where a municipal employee fails to make his ordinary disability benefit payments prior to January 1, 1931, by salary deductions or otherwise, and subsequent to such failure, made no payment for such benefit purposes, prior to January 1, 1931, he is entitled to a refund of any deductions made from his salary for such benefit purposes subsequent to January 1, 1931, upon his separation from the service, unless such employee has reinstated himself since January 1, 1931.

Where a municipal employee failed to make one or more ordinary disability benefit payments, but, subsequent to such failure and prior to January 1, 1931, made his ordinary disability payments, he is entitled to a refund of any such payments so made.

Where a municipal employee fails to make his ordinary disability

disability benefit contributions, by way of salary deductions or otherwise, for the period from January 1, 1931, to July 1, 1931, he is entitled to a refund of all salary deductions paid for ordinary disability benefit since July 1, 1931 upon separation from the service unless he shall pay his unpaid contribution and he is exempt from the provisions for an ordinary disability benefit until he makes such payment.

Where a municipal employee made ordinary disability benefit payments for the first half of 1930 and 1931 but not for the last half of 1930, he shall be charged in his account with the amount unpaid for the last half of 1930 to be deducted from any amount payable to him by way of pension, annuity, disability benefit or refund.

Where an employee was in good standing in the ordinary disability benefit section of the fund on July 1, 1931, he is not entitled to any refund of ordinary disability benefit contributions at any time and any amount of ordinary disability benefit payments which he failed to make, by way of salary deductions or otherwise, should be charged in his account and deducted from the earliest possible and practicable salary or wage payment thereafter due and payable to such municipal employee.

Citation:

Statute: Municipal Employees Annuity and Benefit Fund act, secs. 39, 47.

DISABLED EMPLOYEES ON LEAVE OF ABSENCE

(No. 7369—Commissioner of Public Works—G. F. M.—December 11, 1931—3 pp.)

A department head of the city service, both under the Municipal Pension Fund act of 1911 and the Municipal Employees' Annuity and Benefit Fund act, must report a disabled employee as being on a leave of absence during the entire period of time in which the employee receives a disability pension or a disability benefit as the result of a disability.

Citation:

Statute: SH '31: 24; 1095, 1106 (Municipal Employees' Annuity and Benefit Fund act).

ORDINARY DISABILITY BENEFITS WHILE ON LEAVE OF ABSENCE

(No. 8549—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—October 31, 1934—2 pp.)

A municipal employee whose suspension was cancelled and a leave of absence granted instead, is "in the service" during the period of

such leave and his application for ordinary disability benefits from the Municipal Employees' Annuity and Benefit Fund should be granted.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 47, 51.

LOSS OF ORDINARY DISABILITY BENEFIT RIGHTS

(No. 7518—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—March 28, 1932—3½ pp.)

Deductions cannot be made from the salary of a municipal employee and paid into the Municipal Employees' Annuity and Benefit Fund for ordinary disability benefit purposes when the right of the employee to so contribute has been lost prior to July 1, 1931, and the employee has failed to take advantage of the privilege of regaining the right under the provisions of the amendatory act of July 1, 1931.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 47 (as amended, 1931).

DEDUCTIONS FOR ORDINARY DISABILITY BENEFITS WHEN PAYMENTS LAPSED

(No. 7515—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—March 28, 1932—2 pp.)

When a municipal employee has previously lost all right to ordinary disability benefit protection and is at the time of his separation from the service, exempt from the provisions of the Municipal Employees' Annuity and Benefit Fund act requiring contributions for ordinary disability benefit purposes, the Retirement Board of the Municipal Employees' Annuity and Benefit Fund has no right to deduct arbitrarily from monies due as a refund to the employee, the amounts which the employee would have contributed to the ordinary disability benefit section of the Municipal Employees' Annuity and Benefit Fund, had he been a contributor to that section.

Citations:

References: Opinion No. 7514 (this volume, p. 280).
Opinion No. 7516 (this volume, p. 280).

REINSTATEMENT OF LAPSED EMPLOYEE TO DISABILITY BENEFITS

(No. 7645—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—July 12, 1932—1 p.)

The Retirement Board of the Municipal Employees' Annuity and Benefit Fund has no right to arbitrarily reinstate a lapsed municipal

employee in the ordinary disability benefit section of the fund when such lapsation was caused by a failure to pay the required contributions for disability benefit purposes prior to July 1, 1931.

Hence this board may not arbitrarily deduct the amount of the unpaid disability benefit contributions from any refund of salary deductions otherwise due to such lapsed municipal employee for the period following the lapsation.

Citation:

Reference: Opinion Nos. 7514, 7516, 7518 (this volume, pp. 280, 279).

**ORDINARY DISABILITY BENEFIT OF EMPLOYEE WHOSE
PAYMENTS ARE DELINQUENT**

(No. 7516—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—March 28, 1932—2½ pp.)

The Retirement Board of the Municipal Employees' Annuity and Benefit Fund has no legal right to set upon its books, as accounts receivable, any payments for ordinary disability benefit purposes which an employee may have failed to make prior to July 1, 1931, during a period in which he was on leave of absence, layoff, or the like. Neither does the Retirement Board have the right to deduct any amount for these lapsed payments from any monies payable to the employee, unless and until the employee voluntarily has himself reinstated in the ordinary disability section of the fund, as is provided for the amendment of July 1, 1931, to section 47 of the Municipal Employees' Annuity and Benefit Fund act.

The Retirement Board does not have the right to set up on its books a debit entry for ordinary disability benefit payments or purposes for any employee whose payments have lapsed for the period subsequent to July 1, 1931, unless or until the employee is in good standing in the ordinary disability benefit section of the fund.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 47 (as amended, 1931).

RESTORATION TO ORDINARY DISABILITY BENEFIT RIGHTS

(No. 7514—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—March 28, 1932—4½ pp.)

The amendatory section of the Municipal Employees' Annuity and Benefit Fund act, which gives to a municipal employee who has lost his right to ordinary disability benefits prior to July 1, 1931, the opportunity to regain his lost rights and to again become a contributor to the ordinary disability benefit section of the fund, has reference solely to action on the part of the municipal employee. The employee

cannot be reinstated to his lost rights unless he, himself, applies to be so reinstated.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 47 (as amended, 1931).

**ORDINARY DISABILITY BENEFIT TO EMPLOYEE WHOSE
PAYMENTS ARE DELINQUENT**

(No. 8396—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—May 18, 1934—2½ pp.*)

The purpose of pension laws is beneficial and they should be construed liberally in favor of those to be benefited.

Under a liberal construction of Municipal Employees' Annuity and Benefit Fund act, a disabled employee who had previously lost his right to an ordinary disability benefit because of his failure to make payments for certain periods may now be granted an ordinary disability benefit by deducting the monies owed by him to the fund from the first payments of such benefit to him.

Citations:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 47 (as amended July 1, 1931).

Case: Colton v. Trustees, 287 Ill. 56 (1919).

Opinion No. 7379 of December 14, 1931, to the Retirement Board of the Municipal Employees' Annuity and Benefit Fund is in accord with the above opinion.

TIME LIMIT ON APPLICATION FOR DISABILITY BENEFITS

(No. 6415—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—April 19, 1929—4½ pp.*)

A municipal employee who did not attempt to recover for a disability within five years from the time of the beginning of the disability, who did not notify the Board of Trustees administering the Municipal Employees' Pension Fund act of 1911, of his disability within thirty days of its commencement, and whose disability does not come under the provisions of the act under which he is making his claim, should not be paid a disability benefit.

Citations:

Statutes: SH '27, 83: 15 (Statute of Limitations).

Municipal Employees' Pension Fund act of 1911, secs. 4, 9.

Case: Eddy v. People, 218 Ill. 611 (1905).

DISABILITY DUE TO PREGNANCY

(No. 7107—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—September 1, 1931—2 pp.*)

A municipal employee is not entitled to receive an ordinary disability benefit from the Municipal Employees' Annuity and Benefit Fund, subsequent to July 1, 1931, for any disability which is the result of pregnancy or childbirth.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 47 as amended, July 1, 1931.

ORDINARY DISABILITY BENEFITS TO INSANE EMPLOYEE

(No. 7444—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—February 8, 1932—2½ pp.*)

Any ordinary disability benefit or annuity payable to an employee who has been adjudged insane, can be paid, upon application for it, to a duly appointed conservator, or to his wife, parent or blood relation providing and caring for him. The employee cannot be dealt with directly until he has been declared by a court to be restored to sanity.

Citations:

Statutes: SH '31, 86: 1.

Ill. Laws (1931), p. 315.

Case: Bradshaw v. Lucas, 214 Ill. 218 (1905).

DEDUCTIONS FROM DISABILITY PENSION UNDER 1911 ACT

(No. 6813—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—December 18, 1930—4 pp.*)

A municipal employee who was granted a disability pension under the Act of 1911, as amended, before attaining the age of fifty-five, is to have deducted from his pension the amounts necessary to raise his total accumulations to \$600, within a period of four years after his retirement, and in addition, two dollars and fifty cents is to be taken from his pension each month until he attains the age of fifty-five.

Citation:

Statute: Ill. Laws (1911), p. 158, secs. 1, 7, 9.

*(5) Specific Benefits—Widows and Children***PENSION RIGHTS OF WIDOW AND CHILDREN UNDER
MUNICIPAL PENSION FUND**

(No. 6998—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—July 9, 1931—2 pp.*)

The widow and children of a municipal employee who retired on a pension in 1919 and died subsequent to January 1, 1922, without having reentered the service, are not entitled to pension or annuity.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 52.

AMOUNT OF WIDOW'S SUPPLEMENTAL ANNUITY

(No. 6934—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—June 5, 1931—4½ pp.*)

In cases where a "supplemental annuity" must be paid to a widow the maximum total annuity should not exceed fifty per cent of the final salary of the deceased municipal employee, unless the employee, at the time of his death, had to his credit, for the purpose of providing an annuity for his widow, an amount in excess of that necessary to provide an annuity equal to fifty per cent of his highest salary. In the latter case, the maximum total annuity payable to the widow should be the amount his accumulation will purchase but should not exceed sixty per cent of the employee's highest salary.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 27, 33, 37.

WIDOW'S ANNUITY TO COMMON-LAW WIFE

(No. 6750—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—August 13, 1930—2 pp.*)

A woman, who was the legal and valid wife of a deceased municipal employee during his lifetime by reason of a common-law marriage entered into before the abolishment of common-law marriages in this state, is entitled to the same annuity rights as she would have been had the marriage been solemnized by a regular ceremony.

Citations:

Statute: SH '29, 89: 4.

Case: Port v. Port, 70 Ill. 484 (1873).

DEDUCTIONS FROM WIDOW'S ANNUITY FOR WORKMEN'S COMPENSATION AWARD

(No. 7123—*Retirement Board, Municipal Employees' Annuity and Benefit Fund*—G. F. M.—September 14, 1931—4 pp.)

A widow of a municipal employee is entitled to be paid the full amount of both ordinary and compensation or supplemental annuity, provided for her under the Municipal Employees' Annuity and Benefit Fund act until such time as she receives compensation under the Workmen's Compensation act, and that compensation is to be thereafter deducted from her annuity as the law may then prescribe.

Citations:

Statutes: Cah. '29, 24: 785 (Municipal Employees' Annuity and Benefit Fund act).

Id., 48: 205, 224 (Workmen's Compensation act).

DEDUCTIONS FROM WIDOW'S ANNUITY FOR WORKMEN'S COMPENSATION PAYMENTS

(No. 7134—*Retirement Board, Municipal Employees' Annuity and Benefit Fund*—G. F. M.—September 17, 1931—6 pp.)

Whenever a widow is granted compensation under the Workmen's Compensation act for the death of her husband and is also entitled to a "compensation annuity" and "supplemental annuity" under the Municipal Employees' Annuity and Benefit Fund act, the "compensation annuity" and "supplemental annuity" should be withheld from her until the total of such deductions equals the compensation recovered and received by her under the Workmen's Compensation act.

No deductions should be made from the "ordinary annuity" payable to the widow solely because of any compensation recovered and received by her under the provisions of the Workmen's Compensation act.

Whenever payments of a "compensation annuity" or a "supplemental annuity" have been made to a widow which should have been withheld for the purpose of equalizing compensation recovered and received by her under the Workmen's Compensation act, the annuity payments so paid in error can be retained by the Retirement Board of the Municipal Employees' Annuity and Benefit Fund at any time thereafter out of any future annuity payable to her, either ordinary annuity or otherwise.

Citations:

Statutes: Cah. '29, 48: 205 (Workmen's Compensation act).

Municipal Employees' Annuity and Benefit Fund act, secs. 33, 60.

DEDUCTIONS FOR WORKMEN'S COMPENSATION PAYMENTS FROM WIDOW'S ANNUITY

(No. 8686—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—February 27, 1935—3 pp.*)

A widow's annuity is not subject to a decrease solely because of any award payable to her under the Workmen's Compensation act.

When a widow receives an award under the Workmen's Compensation act and also a compensation annuity under the Municipal Employees' Annuity and Benefit Fund act for the same cause of death, she is entitled to receive only that amount of the compensation annuity which exceeds the workmen's compensation award.

If the workmen's compensation award is paid in a lump sum, the compensation annuity cannot be paid until after the time the amount of the compensation annuity payable to the widow equals the total of the workmen's compensation award.

If the workmen's compensation award is paid in installments, the monthly installments of the compensation annuity should be reduced by an amount equal to the monthly installments of the workmen's compensation award, provided the installments of the workmen's compensation award are less than the compensation annuity installments.

When the workmen's compensation award installments exceed the compensation annuity installments, that excess should be carried forward from month to month as a deduction to be made from future compensation annuity payments, so that the total compensation annuity paid shall be lessened by the total amount of the workmen's compensation award.

Citation:

Statute: SH '33, 48: 142.

RECOUPMENT OF EXCESS ANNUITY OR BENEFIT PAYMENTS FROM WIDOW'S PENSION

(No. 8547—*Retirement Board, Municipal Employees Annuity and Benefit Fund—G. F. M.—October 30, 1934—3 pp.*)

Salary deductions of a municipal employee for his own annuity should be used to recoup excess monies paid to him from the Municipal Employees' Annuity and Benefit Fund for a disability benefit through fraud, misrepresentation or error but the accumulations to pay his widow's pension should be used solely to pay such pension and not to recoup such over-payments.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 60.

RIGHTS TO CHILD'S ANNUITY

(No. 7929—*Retirement Board, Municipal Employees' Benefit and Annuity Fund*—G. F. M.—February 6, 1933—2½ pp.)

Any child the issue of a municipal employee is entitled to receive a child's annuity if such child is under the age of eighteen and had been born before the employee attained the age of sixty-five and before he was separated from the service, provided that the employee died after January 1, 1922, after having been in the service at least four years from the date of his original entrance thereto and at least two years from the date of his latest entrance thereto.

A child's annuity may be paid to the person providing for or caring for such minor without requiring the appointment of a guardian.

For all purposes of the Municipal Employees' Annuity and Benefit Fund act, service during four months in any one calendar year constitutes a year of service.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 40, 45, 51, 60.

Opinion No. 8273 of January 15, 1934, to the Retirement Board, Municipal Employees' Annuity and Benefit Fund is in accord with the above opinion.

TO WHOM CHILD'S ANNUITY PAYABLE

(No. 8298—*Retirement Board, Municipal Employees' Annuity and Benefit Fund*—G. F. M.—February 15, 1934—2 pp.)

A minor's annuity can be paid to his guardian or to the person who is providing for, or caring for, the minor.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, sec. 60 (2).

PAYMENT OF CHILD'S ANNUITY WHEN CHILD MARRIES

(No. 8147—*Retirement Board, Municipal Employees' Annuity and Benefit Fund*—G. F. M.—August 16, 1933—2 pp.)

When a girl who is entitled to a child's annuity from the Municipal Employees' Annuity and Benefit Fund, marries and leaves the home of her mother who no longer supports her, the Retirement Board may pay such annuity to the husband until she reaches the age of eighteen.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 44, 45, 60.

CHILD'S ANNUITY TO GRANDCHILDREN—REFUND OF SALARY DEDUCTIONS TO CHILDREN AND GRANDCHILDREN

(No. 8127—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—July 24, 1933—5½ pp.*)

The provisions for a child's annuity and disability benefit from the Municipal Employees' Annuity and Benefit Fund are limited to the children of the employee, and grandchildren are excluded.

Pension acts should be construed liberally in favor of the persons intended to be benefited.

Where a municipal employee dies leaving no children, the amount of salary deductions refundable from the Municipal Employees' Annuity and Benefit Fund should be paid to the heirs of said employee.

Where a municipal employee dies leaving both living children and grandchildren of a deceased child, the grandchildren are entitled to a distributive part of the share of salary deductions of their parent due from the Municipal Employees' Annuity and Benefit Fund as a refund.

Citations:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 39, 44-46.

Cases: Colton v. Trustees, 287 Ill. 56, 61 (1919).
Hanes v. Central Illinois Co., 262 Ill. 86 (1914).
Martin v. Modern Woodmen of America, 253 Ill. 400 (1912).
Walter v. Cotton, 60 U. S. 355 (1856).

Other reference: Opinion No. 8065 (this volume, p. 263).

ANNUITY TO CHILD OF FORMER WIFE—WIDOW'S ANNUITY IF MARRIAGE TO EMPLOYEE OVER SIXTY-FIVE

(No. 8548—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—October 31, 1934—2 pp.*)

When a deceased municipal employee is survived by a widow and the child of a deceased former wife, the child, if under eighteen years old, should receive ten dollars per month as a child's annuity from the Municipal Employees' Annuity and Benefit Fund.

The widow of the deceased employee who married him after January 1, 1922, is not entitled to an annuity unless she married him before he attained age of sixty-five years.

Where a balance of salary deductions is left in the Municipal Employees' Annuity and Benefit Fund, the deductions of the deceased employee in excess of the annuity payments should be refunded to the heirs.

Citation:

Statute: Municipal Employees' Annuity and Benefit Fund act, secs. 38, 39, 45.

D. POLICEMEN'S ANNUITY AND BENEFIT FUND

(1) *Scope*

APPLICABILITY TO POLICE COMMISSIONER

(No. 7481—*Retirement Board, Policemen's Annuity and Benefit Fund*—G. F. M.—March 7, 1932—3 pp.)

The provisions of the Policemen's Annuity and Benefit Fund act apply to the Commissioner of Police, whether he be a civilian appointee or a member of the department on leave of absence from his civil service position.

Where the commissioner is on leave of absence from his position as captain, a deduction should be made from each payment of his present salary and placed to his credit in the fund.

Citations:

Statute: Policemen's Annuity and Benefit Fund act, secs. 1, 12, 13, 16, 17, 21, 24, 46.

Ordinance: Code '31: 277.

Case: Hope v. City of Alton, 214 Ill. 102 (1905).

POLICE SURGEON, CHIEF SURGEON AND DRILL MASTER

(No. 6904—*Retirement Board, Policemen's Annuity and Benefit Fund*—G. F. M.—May 18, 1931—2 pp.)

The term "policeman" under the provisions of the Policemen's Annuity and Benefit Fund act, includes police surgeon, chief surgeon, drill master and identification officer.

Citation:

Case: People v. Foreman, 296 Ill. 487 (1921).

RIGHT OF AMBULANCE ATTENDANT IN FUND

(No. 7779—*Retirement Board, Policemen's Annuity and Benefit Fund*—G. F. M.—October 18, 1932—2 pp.)

An employee who served in the Police Department as an ambulance attendant and hospital orderly is not entitled to a service credit in the Policemen's Annuity and Benefit Fund unless there is evidence that he was sworn in as a policeman while performing that service.

Citation:

Reference: Opinion No. 7212 (this volume, p. 293).

TEMPORARY APPOINTEES, SALARY DEDUCTIONS

(No. 6960—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—June 19, 1931—1½ pp.)

The Policemen's Annuity and Benefit Fund applies not only to civil service employees but also to policemen holding temporary appointments in the Police Department.

Deductions for the Policemen's Annuity and Benefit Fund should be made from the actual salary, not from the salary of the civil service rank of a policeman, excepting deductions for widow's annuity.

Deductions from the salary of a member of the Police Department should be made from the actual salary paid him, regardless of his civil service work and regardless of whether the salary is that of a temporary position or a position held through civil service certification and appointment.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, sec. 13.

PARTICIPATION BY POLICE PHOTOGRAPHER AND IDENTIFICATION INSPECTOR

(No. 8741—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—April 11, 1935—5½ pp.)

A police photographer and identification inspector should be a participant in the Policemen's Annuity and Benefit Fund and the Retirement Board of the Municipal Employees' Annuity and Benefit Fund should turn over all deductions from the salary of the employee erroneously paid into its fund, with the interest accumulations.

Citations:

Statutes: Policemen's Pension Fund act (1915), sec. 7.
Policemen's Annuity and Benefit Fund act (1921), sec. 12 as amended July 1, 1931.

Case: People v. Foreman, 296 Ill. 487 (1921).

RIGHTS OF SKILLED LABORER IN FUND

(No. 7517—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—March 28, 1932—2½ pp.)

A person classified in the skilled labor service, not classified in the police service, and a contributor to the Municipal Employees' Pension Fund, is not entitled to any of the benefits of the Policemen's Annuity and Benefit Fund act, nor is his widow entitled to a pension from that fund.

(2) *General Rights*

Pension Law Mandatory: The Police Pension Law is mandatory and not merely directory.—*Donahue v. Board of Trustees*, 263 Ill. App. 568 (1931).

DATE OF PARTICIPATION WHEN SALARY DEDUCTIONS NOT MADE

(No. 8116—*Retirement Board, Policemen's Annuity and Benefit Fund*
—*G. F. M.*—July 13, 1933—2 pp.)

A policeman is entitled to participation in the Policemen's Annuity and Benefit Fund from the date he is appointed and sworn as a member of the police force of the city.

Where a policeman is not responsible for the failure to make deductions for purposes of the Policemen's Annuity and Benefit Fund, he has a right to pay the sum which those deductions would have amounted to with the interest they would have brought and he should thereupon be credited with the corresponding proper amount of city contributions with interest thereon. Upon payment by the employee, he is entitled to a service credit for the period paid.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, secs. 1, 12.

SALARY DEDUCTIONS FOR ADMINISTRATIVE EXPENSE

(No. 6962—*Retirement Board, Policemen's Annuity and Benefit Fund*
—*G. F. M.*—June 19, 1931—2 pp.)

The amount of salary to be used in computing the deduction of one-eighth of one per cent for the administrative expenses of the Policemen's Annuity and Benefit Fund should be the actual salary paid to each policeman, regardless of the nature of his appointment.

Citation:

Statute: Policemen's Benefit Fund act, secs. 1, 12.

SERVICE CREDITS OF POLICEMAN OF ANNEXED VILLAGE

(No. 7007—*Retirement Board, Policemen's Annuity and Benefit Fund*
—*G. F. M.*—July 14, 1931—2½ pp.)

Policemen of any annexed territory who shall be employed by the City of Chicago as policemen on the date of such annexation should be given prior service credits in the Policemen's Annuity and Benefit Fund for the period of service as policemen of the annexed territory and should be given prior service credits as of the date of annexation

in the same manner and to the same effect as such credits are given to "present employees" under the Policemen's Annuity and Benefit Fund act.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, secs. 14, 19, 42.

ASSIGNMENTS OF BENEFITS FROM FUND

(No. 7657—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—July 21, 1932—2 pp.)

An annuitant or beneficiary of the Policemen's Annuity and Benefit Fund may not transfer or assign his or her benefits from the fund.

When an annuitant or beneficiary must use benefits for living expenses in an institution, he has a right to execute a power of attorney to the superintendent of the institution where he resides to cash his monthly checks, such power of attorney not being an assignment but a power of endorsement for his own benefit and protection.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, sec. 58.

SALARY BASIS FOR SALARY DEDUCTIONS

(No. 7008—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—July 14, 1931—4 pp.)

The City Paymaster must make salary deductions from the actual salary of each employee of the Police Department, irrespective of the nature of his appointment or the amount of his salary, for the Policemen's Annuity and Benefit Fund.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, sec. 55 (as amended July 1, 1931).

FAILURE TO MAKE SALARY DEDUCTIONS

(No. 6675—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—May 20, 1930—3½ pp.)

The Retirement Board can compel payment by policemen into the Policemen's Annuity and Benefit Fund of money to remove a deficiency in his salary deductions caused by an error in transcribing his age.

The provisions of the law which require deductions to be made from the salary of policemen for annuity and ordinary disability bene-

fit purposes are mandatory, and if the deductions are not made accordingly, the policeman should have the amounts, which should have been deducted from his salary, debited in his account and an effort be made to obtain the money from him.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, secs. 36, 46.

SERVICE CREDITS AND SALARY DEDUCTIONS UPON ILLEGAL DISCHARGE—DEDUCTIONS AFTER FIFTY-SEVEN YEARS OF AGE

(No. 8722—*Retirement Board, Policemen's Annuity and Benefit Fund*—G. F. M.—March 18, 1935—4½ pp.)

A policeman illegally discharged has the right to have the period of his illegal discharge added to the total period of his service for annuity purposes, but not for benefits under section 55 of the act.

An illegally discharged policeman should be charged in the Policeman's Annuity and Benefit Fund with an amount equal to the salary deductions with interest, which would have been paid into the fund had deductions been made from his salary and paid into the fund during the period of his illegal discharge.

Deductions made from the salary of a policeman and paid into the Policemen's Annuity and Benefit Fund since he attained the age of fifty-seven years should be held in the fund until they exceed the amount required to be paid by him under Section 17 of the Policemen's Annuity and Benefit Fund.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, secs. 12, 13, 17, 22, 46, 49, 55.

Opinion No. 8363 of April 13, 1934, to the Retirement Board of the Policemen's Annuity and Benefit Fund is in accord with the above opinion.

STATUS OF SUSPENDED PATROLMAN

(No. 7632—*Retirement Board, Policemen's Annuity and Benefit Fund*—G. F. M.—July 1, 1932—1½ pp.)

Suspension does not constitute separation from the city service, and a suspended patrolman should be considered a "present employee" for the purposes of the Policemen's Annuity and Benefit Fund where such suspension existed on December 31, 1921.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, sec. 12.

SERVICE CREDITS FOR SERVICE IN FIRE AND OTHER DEPARTMENTS

(No. 8875—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—September 18, 1935—3 pp.)

A policeman is entitled to service credits in the Policemen's Annuity and Benefit Fund for prior periods of service rendered in the Fire Department upon his payment of salary deductions to the Policemen's Annuity and Benefit Fund equal to those required from him during that period for the Firemen's Annuity and Benefit Fund. No service credit can be given for periods of service in other than the Police and Fire Departments. No service credits can be given for periods of service in other than the Police or Fire Departments.

Citations:

Statutes: ISBS '35, 24: 892.

Policemen's Annuity and Benefit Fund act, sec. 12, 41, as amended.

Opinion No. 6637 of April 11, 1930, to the Retirement Board of the Policemen's Annuity and Benefit Fund is in accord with the above opinion.

SERVICE CREDITS AND SALARY DEDUCTIONS OF POLICE SURGEONS

(No. 7212—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—October 26, 1931—3½ pp.)

The chief surgeon and police surgeons should be credited in the Policemen's Annuity and Benefit Fund with their full respective periods of service from the date of beginning of their respective periods in their positions in the Police Department to the same effect as if they had always been participants in this fund.

All salary deductions received by the Policemen's Annuity and Benefit Fund from the Municipal Employees' Annuity and Benefit Fund as having been credited to these employees in that fund should be credited to these employees in the Policemen's Annuity and Benefit Fund. Any difference in the amount so credited and the amount which these employees should have paid had they made continuous contributions to the Policemen's Annuity and Benefit Fund should be collected from them before they shall be credited with the period or periods of service represented by the unpaid contributions.

Citations:

Statute: Policemen's Annuity and Benefit Fund act (1921), sec. 49, 59½ as amended (1929).

Case: Carpenter v. Chicago, 192 Ill. App. 558 (1915).

REFUNDABILITY OF SALARY DEDUCTIONS

(No. 7461—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—February 24, 1932—2½ pp.)

Salary deductions or other contributions made prior to January 1, 1922, are not refundable under the Police Pension Fund act of 1915. Salary deductions made subsequent to January 1, 1922, are refundable to the policeman's estate to the extent that such policeman or his widow have not received a sum equal to the total of his deductions in the form of annuities.

Citation:

Statute: SH '31, 24: 983 (*Policemen's Annuity and Benefit Fund act*, secs. 39e, 12, 17).

REFUNDABILITY OF SALARY DEDUCTIONS

(No. 7662—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—July 25, 1932—1½ pp.)

There is no provision in any of the Police Pension Fund acts prior to July 1, 1921, which allows a refund to any policeman of any contribution paid by him into any police pension fund.

While the Policemen's Annuity and Benefit Fund act provides for refunds in certain circumstances, it does not apply to contributions made to any previous police pension funds.

Citation:

Case: *Hughes v. Traeger*, 264 Ill. 612 (1914).

Opinions No. 7249 of November 3, 1931, and No. 7608 of June 15, 1932, both to the Retirement Board, *Policemen's Annuity and Benefit Fund* are in accord with the above opinion.

REFUND OF SALARY DEDUCTIONS FOR ADDITIONAL ANNUITY PAYMENTS

(No. 6963—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—June 19, 1931—1½ pp.)

A future entrant who has made additional annuity payments into the Policemen's Annuity and Benefit Fund, has the right to have refunded to him the payments so made, in the event that he becomes separated from the service before attaining the age of fifty-seven years with less than twenty years of service to his credit, or in the event that he becomes separated from the service before the age of fifty years or before he has served for a period of ten years.

Citation:

Statute: *Policemen's Annuity and Benefit Fund act* (as amended, 1929), secs. 16, 39.

REFUND OF SALARY DEDUCTIONS UPON RETIREMENT BEFORE FIFTY-SEVEN YEARS OF AGE

(No. 7030—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—July 27, 1931—2 pp.)

Any member of the Police Department, irrespective of the length of actual service in the department, who has not paid into the Policemen's Annuity and Benefit Fund, either through salary deductions or voluntary contributions, an amount representing his salary deductions for a ten-year period prior to his separation from service, is entitled to a refund of the actual amount of salary deductions standing to his credit in the fund at any time before his annuity is fixed, if he separates from the service before attaining the age of fifty-seven.

Citations:

Statute: Policemen's Annuity and Benefit Fund act, secs. 39, 59½.
Case: Carpenter v. Chicago, 199 Ill. App. 558 (1917).

REFUND OF SALARY DEDUCTIONS FOR WIDOW'S ANNUITY

(No. 6562—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—December 11, 1929—2½ pp.)

A policeman, whose wife dies after he has reached the age of fifty-seven, is not entitled to a refund of his salary deductions made for a widow's annuity.

Citations:

Statute: Policemen's Annuity and Benefit Fund act, secs. 21, 22, 39.
Case: Stiles v. Board of Trustees of the Police Pension Fund, 281 Ill. 636 (1918).

PAYMENT OF SALARY DEDUCTION REFUNDS OF DECEASED POLICEMAN

(No. 7937—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—February 9, 1933—2 pp.)

Where a policeman dies leaving no children, the salary deductions to be refunded should be paid to his administrator if there be one, and if not, then the deductions may be applied toward the burial expenses, and any balance remaining thereafter should be paid to his heirs.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, sec. 39(e).

Opinion No. 6761 of August 28, 1930, to the Retirement Board of the Policemen's Annuity and Benefit Fund is in accord with the above opinion.

AMOUNT OF SALARY DEDUCTION REFUND OF DECEASED ANNUITANT

(No. 8591—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—December 14, 1934—1½ pp.)

A refund is due the children, estate or heirs of a deceased annuitant amounting to the difference between the total amount of salary deductions made from January 1, 1922, to the date of his death plus interest to the date the annuity began, and the entire amount paid to him in the form of annuity.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, sec. 39(e).

Opinion No. 8574 of November 26, 1934, to the Retirement Board, Policemen's Annuity and Benefit Fund is in accord with the above opinion.

REFUND OF SALARY DEDUCTIONS TO REMARRIED WIDOW

(No. 8543—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—October 26, 1934—2 pp.)

Where the amount of annuity payments to a policemen's widow, which have been terminated by her remarriage, amount to less than the total salary deductions of her deceased husband in the Policemen's Annuity and Benefit Fund, the difference between these two amounts should be refunded to the widow.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, sec. 57.

PAYMENT OF SALARY DEDUCTION REFUNDS—STEP-SON'S STATUS UNDER THE FUND

(No. 8243—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—December 14, 1933—2 pp.)

A refund by the Policemen's Annuity and Benefit Fund to a deceased pensioner may be used to pay his burial expenses, and the balance paid to his heirs according to law.

Step-sons of a pensioner are not his "children" under the Policemen's Annuity and Benefit Fund act.

Citations:

Statutes: Policemen's Annuity and Benefit Fund act, sec. 39.
SH '33, 38: 1.

PAYMENT OF POLICEMAN'S ANNUITY OR BENEFIT TO WIFE FOR SUPPORT

(No. 7607—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—June 15, 1932—2 pp.)

It is the duty of a husband to support his wife, and the Policemen's Annuity and Benefit Fund act gives to the Retirement Board power to pay to the wife of any annuitant, pensioner or bisability beneficiary such an amount out of her husband's annuity, pension or disability pension as the board may consider necessary for her support, if her husband fails to support her.

The fact that a beneficiary of the Policemen's Annuity and Benefit Fund lives in another state does not exempt him from operation of the Policemen's Annuity and Benefit Fund act.

Citations:

Statute: Policemen's Annuity and Benefit Fund act, sec. 52.

Cases: Johnson v. Johnson, 125 Ill. 510 (1888).

Raul v. Raul, 75 Ill. App. 283 (1897-98).

PAYMENT OF PAST PENSION OF DECEASED PENSIONER TO HEIRS

(No. 7782—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—October 18, 1932—1 p.)

When a pensioner of the Policemen's Annuity and Benefit Fund died without cashing a pension check and leaves two heirs, a son and daughter, and when the daughter filed a power of attorney, given to her by the son to perform all acts necessary for the disposition of the estate, the Retirement Board of the Policemen's Annuity and Benefit Fund may pay the son's share of the estate to the daughter.

(3) Specific Benefits—Retirement

LAW DETERMINING PENSIONER'S RIGHTS

(No. 6767—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—September 12, 1930—3½ pp.)

The status of a pensioner is fixed by the law existing at the time he applies for a pension, and he is not entitled to increases provided in later pension laws.

Citations:

Statute: Policemen's Pension Fund act (1915), as amended (1917), sec. 3(a).

Cases: Beutel v. Foreman, 228 Ill. 106 (1907).

Hughes v. Traeger, 264 Ill. 612 (1914).

Pecoy v. Chicago, 265 Ill. 78 (1915).

O'Connor v. Trustees of Firemen's Pension Fund, 155 Ill. App. 460 (1910).

Stiles v. Board of Trustees, 281 Ill. 636 (1918).

PAYMENT OF ANNUITY UPON NOTICE OF INJUNCTION

(No. 8540—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—October 25, 1934—2 pp.)

When the Retirement Board of the Policemen's Annuity and Benefit Fund has not been brought into court by summons in a suit to enjoin payments of an annuity awarded to a certain person, the annuity awarded to such person should be paid in spite of notice of said injunction as the Policemen's Annuity and Benefit Fund act specifies to whom an annuity should be paid and does not give to any court the control over such payment.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, sec. 58.

ANNUITY CONTRIBUTION WHILE ON LEAVE OF ABSENCE

(No. 6760—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—August 28, 1930—2 pp.)

A present employee cannot make payments for annuity purposes into the Policemen's Annuity and Benefit Fund while on a leave of absence, even though his leave was for the purpose of accepting a temporary appointment to a position paying a larger salary in the same department.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, sec. 17.

(Note: The interpretation of the law in this matter was changed subsequent to the date of this opinion.)

SALARY BASIS FOR ANNUITY OR BENEFITS

(No. 7600—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M. and L. H.—June 10, 1932—2½ pp.)

The salary of an officer or employee in the Police Department, as a basis for pension and disability rights in the Policemen's Annuity and Benefit Fund, is the salary actually appropriated in the annual appropriation ordinance, regardless of anything else that appears in the ordinance to indicate the manner in which the amount was arrived at or the basic figure taken for a computation.

PENSION RIGHTS WHILE WORKING AS TEMPORARY EMPLOYEE

(No. 6724—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—July 22, 1930—3 pp.)

A policeman pensioner working in the Police Department on temporary appointment cannot be paid his pension during the period of that employment, and the payment of his pension should be suspended for that period.

Citations:

Statute: *Policemen's Annuity and Benefit Fund act*, sec. 35.

Other references: *Op. Corp. Counsel* (1923-24), p. 810.

Opinions No. 6936 of June 5, 1931, and No. 7534 of April 9, 1932, to the Retirement Board, *Policemen's Annuity and Benefit Fund* are in accord with the above opinion.

PAYMENT OF ANNUITY AFTER REENTERING SERVICE

(No. 7954—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—February 23, 1933—2 pp.)

When a policeman, who resigned or was discharged from the service after January 1, 1922, reenters the service after the age of fifty-seven years, payments of any annuity previously granted to him are to be suspended during the time that he remains in the service; and when he again resigns or is discharged the annuity payments may be resumed.

Citation:

Statute: *Policemen's Annuity and Benefit Fund act*, sec. 34(b), 55.

PENSION RIGHTS OF POLICEMEN OF ANNEXED TERRITORY

(No. 6847—*Acting Commissioner of Police—F. J. V.—March 13, 1931—1½ pp.*)

In determining the pension rights of a policeman of a territory annexed to the city, the period of his service should date from the commencement of his service in the annexed territory and not from the date of the annexation of the territory to the city.

Citations:

Case: *People v. Board of Pension Trustees*, 220 Ill. App. 242 (1921).

Other reference: 17 *Op. Corp. Counsel*, p. 381.

RESIGNATION BY CONSERVATRIX OF INSANE POLICEMAN

(No. 8260—*Commissioner of Police—G. F. M.—January 3, 1934—1½ pp.*)

The conservatrix of an insane person may, on securing the proper order from the Probate Court, execute a resignation in the insane person's name from the Police Department for the purpose of obtaining a pension for the insane person.

Citation:

Statute: SH '33, 86: 1.

ANNUITY PAYMENTS OF INSANE POLICEMAN DECLARED SANE

(No. 8685—*Retirement Board, Policemen's Annuity and Benefit Fund—G. F. M.—February 27, 1935—2 pp.*)

Annuity payments which were being paid to the conservatrix of the estate of an annuitant who has been insane but who has now been declared sane by the court, should in the future be paid to the annuitant himself.

Citations:

Statutes: SH '33, 85: 25.

Case: Sipple v. Wolf, 343 Ill. 284 (1931).

INTEREST ON ANNUITY PAYMENTS LEFT IN FUND

(No. 6843—*Retirement Board, Policemen's Annuity and Benefit Fund—G. F. M.—March 2, 1931—3½ pp.*)

The Retirement Board of the Policemen's Annuity and Benefit Fund has no power to pay interest to an annuitant whose monies are voluntarily left in the fund when the monies are checked out monthly and redeposited in the fund, and are carried on the books to the credit of the annuitant subject to payment on demand.

Citation:

Statute: Cah. '29, 74: 2.

DELAYED INTEREST ON PENSION OR ANNUITY AWARDS

(No. 8871—*Retirement Board, Policemen's Annuity and Benefit Fund—G. F. M.—September 17, 1935—1 p.*)

The Retirement Board of the Policemen's Annuity and Benefit Fund has no power to pay interest on pension or annuity awards, the payment of which may for good reason have been delayed.

DETERMINING DATE OF ANNUITANT'S DEATH FOR ANNUITY PURPOSES

(No. 8567—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—November 19, 1934—2 pp.)

Where the date of annuitant's death is unknown, the date of death for purposes of annuity payments to the estate should be the date on which the dead body was found, unless the condition of the body indicates with a reasonable certainty that death occurred some reasonably certain time before the finding of the body.

SALARY BASIS FOR RETIREMENT PENSION UNDER POLICE PENSION FUND ACT

(No. 7848—*Chief of Police, Evanston, Illinois*—L. H.—December 21, 1932—2 pp.)

The salary basis for the minimum retirement pension of Chicago policemen is the salary existing on a day one year prior to the date of retirement, whereas the basis for Evanston policemen is the amount of salary attached to the rank the year immediately prior to such retirement.

Citations:

Statutes: SH '29, 24: 1000 (Annuity and Benefit Fund act for Cities of more than 200,000, sec. 55).

Pension Fund act for Cities and Villages of 5,000 to 200,000, sec. 3.

SALARY DEDUCTIONS DURING DISABILITY

(No. 6624—*Retirement Board, Policemen's Annuity and Benefit Fund*
G. F. M.—March 20, 1930—2 pp.)

The salary to be used as a basis for computing contributions for annuity purposes, when a policeman is receiving ordinary disability benefit, is that which was being paid to him at the time of the cessation of his active service.

During the period of a policeman's disability, the same amount should be deducted from his ordinary disability benefit and paid into the Policemen's Annuity and Benefit Fund towards his annuity as would have been deducted from his salary and paid into the fund were he still in active service.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, sec. 45.

SERVICE CREDIT FOR PERIOD OF DISABILITY PENSION

(No. 6829—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—January 22, 1931—6 pp.)

A policeman who on January 1, 1922, was in receipt of a disability pension under the Policemen's Pension act of 1915, as amended, and who subsequently reentered the service of the Police Department, cannot be credited, for annuity purposes, with the period of time during which he was in receipt of the disability pension.

Citations:

- Statutes: Police Pension Fund act (1915), sec. 8.
Policemen's Annuity and Benefit Fund act of 1921, secs. 35, 36, 49, 50.
Case: Sup v. Cervenka, 331 Ill. 459, 464 (1928).

REPAYMENT OF SALARY DEDUCTION REFUNDS TO OBTAIN ANNUITY

(No. 8541—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—October 25, 1934—3 pp.)

A retired policeman may not repay into the Policemen's Annuity and Benefit Fund his salary deductions withdrawn by him subsequent to his separation from the service and thereby become entitled to an annuity unless he reenters the service.

Citation:

- Statute: Policemen's Annuity and Benefit Fund act, secs. 39 (f, g), 59½.

"DROPPED FROM ROLLS" A DISCHARGE—ANNUITY RIGHTS IF OVER FIFTY YEARS OF AGE

(No. 8894—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—October 14, 1935—2½ pp.)

"Dropped from the rolls" constitutes a "discharge" within the meaning of the Policemen's Annuity and Benefit Fund act.

A person discharged, while a "present employee" and being more than fifty years of age, is entitled to an annuity equal to fifty per cent of his salary as it was on the day one year prior to the date of his discharge, or of his salary on July 1, 1931, whichever is the larger amount.

Citations:

- Statutes: ISBS '35, 24: 696.
Policemen's Annuity and Benefit Fund act, secs. 12, 55 (par. 2).

ELIGIBILITY OF REINSTATED POLICEMAN TO HALF PAY ANNUITY

(No. 8576—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—November 30, 1934—2 pp.)

A reinstated policeman who resigns from service at the age of fifty years or over and with a service record of twenty years or more, must have been in service on the day one year previous to the date of his resignation, in order to be eligible for a half-pay annuity under section 55 of the Policemen's Annuity and Benefit Fund act.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, sec. 55.

PURPOSE OF AMENDMENT TO SECTION 55 OF ANNUITY ACT

(No. 7501—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—March 18, 1932—3½ pp.)

The chief purpose of the amendment made to section 55 of the Policemen's Annuity and Benefit Fund act on July 1, 1931, was to limit the annuity of a present employee to either the annuity which his accumulation would purchase for him, or to a half of the salary attached to, or appropriated for the civil service rank which he held on the day one year prior to his resignation or discharge, that is, to whichever might be the larger pension.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, secs. 12, 55 (as amended, 1931).

ACTUARIAL RESERVE FOR ANNUITANT REENTERING SERVICE

(No. 7500—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—March 17, 1932—4 pp.)

The method to be used in setting up the actuarial reserve of any present employee annuitant who reenters the service subsequent to the attainment of the age of fifty-seven years, should take into account the possibility of the reentrant retiring under section 55 of the Policemen's Annuity and Benefit Fund act.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, secs. 17, 31, 34, 55.

RETIREMENT AND WIDOW'S PENSION WHEN DEATH OF PENSIONER HUSBAND UNCERTAIN

*(No. 8684—Retirement Board, Policemen's Annuity and Benefit Fund
—G. F. M.—February 27, 1935—2 pp.)*

Whenever it is not known whether a pensioner or annuitant is alive, payment of his pension or annuity should be discontinued, even though there is a conservatrix of his estate.

The fact that an insane annuitant or pensioner has not been heard from for over seven years creates a rebuttable presumption that he is dead, and his wife should receive a widow's pension until such a time as definite information of his death is obtained or until a court adjudges him legally dead. In the event his actual death is established, the difference between the amount of the annuity or pension that had been paid to his wife as conservatrix of the insane policeman and the amount that should have been paid to her as his widow from the date of his death should be charged to her and an adjustment made to recoup that difference from her future widow's pension payments.

ANNUITY OF POLICEMAN OVER FIFTY YEARS OF AGE— DUTY DISABILITY AFTER AGE OF FIFTY-SEVEN

*(No. 8242—Retirement Board, Policemen's Annuity and Benefit Fund
—G. F. M.—December 14, 1933—2 pp.)*

An employee of the Police Department who is over fifty years of age, who has put in twenty or more years of service, and who resigns or is discharged from the service on or after January 1, 1922, has the right to receive an annuity of an amount not less than fifty per cent of the compensation appropriated for the rank in the Police Department which he may have held by virtue of civil service appointment on the day one year before the date on which he resigns, and that compensation shall be assumed to be not less than the amount which it was on July 1, 1931.

A policeman, who has been receiving a duty disability benefit, ceases to receive that benefit at the age of fifty-seven years, and if he is still disabled, he should receive such annuities as are provided by the Policemen's Annuity and Benefit Fund act.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, secs. 45, 55.

Opinions No. 8815 of July 16, 1935, and No. 7981 of March 24, 1933, both to the Retirement Board, Policemen's Annuity and Benefit Fund are in accord with the above opinion.

AGE OF PARTICIPANT—ANNUITY OF POLICEMEN OF TWENTY YEARS' SERVICE UNDER FIFTY YEARS OF AGE

(No. 7948—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—February 17, 1933—2½ pp.)

The age stated in the civil service application is binding on the Retirement Board of the Policemen's Annuity and Benefit Fund in the absence of fraud.

A policeman who has completed more than twenty years of service and who is discharged when less than fifty years of age, is entitled to an annuity from the date upon which he became fifty years of age, of an amount equal to fifty per cent of his salary, but not in excess of \$900.00 a year.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, secs. 55, 59.

AMOUNT OF PENSION DUE POLICEMAN RESIGNING BEFORE AGE OF FIFTY

(No. 8506—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—September 25, 1934—2 pp.)

A member of the Police Department who had served twenty years in the Police Department and resigned before attaining the age of fifty is entitled to receive a pension of half salary but not to exceed nine hundred dollars per year after he attained the age of fifty years under the Police Pension Fund act of 1915.

Citations:

Statutes: Pension Fund act (1915), sec. 3.
Ill. Laws (1917), p. 275.

ANNUITY RIGHTS OF DISCHARGED POLICEMAN OVER FIFTY YEARS OF AGE WITH TEN YEARS' SERVICE

(No. 8542—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—October 25, 1934—2 pp.)

A police employee who has served more than ten years and who is more than fifty but less than fifty-seven years of age, is entitled to be paid an annuity from the date of his discharge of such an amount as his annuity accumulation will provide.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, sec. 31 par. (d) 1

INTEREST ON ANNUITY ACCUMULATIONS

(No. 6645—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—April 23, 1930—2 pp.)

A policeman who serves more than ten years and resigns or is separated from the service before he is fifty years old is entitled to have interest accrue on the accumulation standing to his credit in the Policemen's Annuity and Benefit Fund until he reaches the age of fifty-seven unless he sooner applies for an annuity. In the latter event, interest shall no longer accrue.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, secs. 27, 28.

RIGHTS OF REINSTATED POLICEMAN OVER FIFTY-SEVEN YEARS OF AGE

(No. 8015—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—April 13, 1933—4 pp.)

A policeman over 57 years of age who has been in the service more than twenty years, and who has served more than five years since his last reinstatement is eligible to retire. If the amount he owed the Policemen's Annuity and Benefit Fund at the time of his last discharge is not paid before the time he applies for an annuity or a refund, the amount unpaid should be deducted from any money then payable.

Where no service annuity has yet been granted to a "future entrant" policeman, deductions from his salary cease when he becomes fifty-seven years of age.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, secs. 17, 36, 55½.

ELIGIBILITY FOR PRIOR SERVICE ANNUITY, REFUND OF EXCESS SALARY DEDUCTIONS

(No. 6473—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—July 18, 1929—6 pp.)

A present employee under the Policemen's Annuity and Benefit Fund act who has to his credit for prior service annuity purposes on January 1, 1922, an amount at least sufficient to provide an annuity for such employee equal to that which would be provided if deductions had been properly made during the entire period of his service until he had reached fifty-seven years, is to have the amount of prior service annuity to which he will have a right from and after the date

of his resignation or discharge fixed on January 1, 1922; such employee does not have any right to receive an age and service annuity.

A present employee under the Policemen's Annuity and Benefit Fund act who has his annuity fixed on January 1, 1922, is entitled to a refund of a proportionate amount of any excess of accumulations to his credit over and above the amount necessary to provide the annuity so fixed.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, secs. 12, 15, 17, 18, 27, 31, 37.

PENSION RIGHTS IN POLICE PENSION FUND OF 1887

(No. 7858—*Retirement Board, Policemen's Annuity and Benefit Fund*—G. F. M.—December 27, 1932—1½ pp.)

Under the Police Pension Fund act of 1887, as amended, a policeman whose combined years of service upon the police force and in the Fire Department aggregates twenty years or more becomes entitled to a pension after attaining the age of fifty and his wife becomes entitled to pension after his death, but no such rights accrue until he has served twenty years.

Citations:

Statute: Ill. Laws (1903) p. 109 (Police Pension Fund, 1887, sec. 3 as amended).

Other reference: Opinion No. 7780 (this volume, p. 316).

(4) Specific Benefits—Disability

POLICE PENSION FUND, REVIEW OF DISABILITY PENSIONS

(No. 8819—*Retirement Board, Policemen's Annuity and Benefit Fund*—G. F. M.—July 18, 1935—3 pp.)

The Retirement Board of the Policemen's Annuity and Benefit Fund should correct the error it made in beginning an employee's disability pension on the wrong date.

The Retirement Board of the Policemen's Annuity and Benefit Fund can review the grant of a disability pension only when fraud, misrepresentation, or a mistake is present.

The Statute of Limitations does not affect pension rights.

SALARY BASIS OF DUTY DISABILITY BENEFIT AND CHILD'S DISABILITY BENEFIT

(No. 8033—*Retirement Board, Policemen's Annuity and Benefit Fund—G. F. M.—April 27, 1933—2 pp.*)

In computing the duty disability benefit payable to a policeman injured in the performance of an act of duty, his salary should be assumed to be not less than it was on July 1, 1931.

The child's disability benefit to which a policeman injured in the performance of an act of duty is entitled should be ten dollars per child, but not exceeding twenty-five per cent of his salary at the time he sustained his injuries.

Citations:

Statutes: Policemen's Annuity and Benefit Fund act, sec. 45.
Act on Computation of Disability Benefit, signed Oct. 4, 1932.

DUTY DISABILITY BENEFIT WHEN INJURED BY ORDINARY RISK

(No. 6674—*Retirement Board, Policemen's Annuity and Benefit Fund—G. F. M.—May 20, 1930—4 pp.*)

A policeman crossing a boulevard for the purpose of escorting persons waiting on the opposite side of the street is not performing an act which inherently involves a risk not ordinarily assumed by the average citizen and thus is not subject, for injuries sustained while so acting, to duty disability benefit under the Policemen's Annuity and Benefit Fund act.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, secs. 12, 45.

ORDINARY DISABILITY BENEFITS FOR LESS THAN THIRTY DAYS

(No. 8533—*Retirement Board, Policemen's Annuity and Benefit Fund—G. F. M.—October 23, 1934—2 pp.*)

A policeman is not entitled to an ordinary disability benefit from the Policemen's Annuity and Benefit Fund for a period of disability of less than thirty days.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, sec. 46.

AMOUNT OF ORDINARY DISABILITY BENEFIT

(No. 8874—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—September 18, 1935—2½ pp.)

An ordinary disability benefit of policeman is one-half of his salary as such salary was on the date his disability occurred.

Citations:

Statute: Policemen's Annuity and Benefit Fund act, secs. 12, 46.

Other reference: Opinion No. 7724 (this volume, p. 309).

AMOUNT OF DEDUCTIONS FOR ORDINARY DISABILITY BENEFITS

(No. 8743—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—April 16, 1935—1½ pp.)

An ordinary disability benefit for a policeman is one-half of his salary at the time his disability occurred. Deductions to be made for annuity purposes from his ordinary disability benefit payments should be computed on the same salary basis as the disability benefits.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, sec. 46.

SALARY BASIS FOR ORDINARY DISABILITY BENEFITS

(No. 7673—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—July 29, 1932—2 pp.)

The ordinary disability benefit computation for the Policemen's Annuity and Benefit Fund is based on the salary of the policeman at the time the disability occurs.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, secs. 12, 46.

**SALARY BASIS FOR ORDINARY DISABILITY BENEFITS—
COMMENCEMENT OF DISABILITY**

(No. 7724—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—August 22, 1932—1½ pp.)

Ordinary disability benefits must be based on the salary of a policeman as such salary is at the time he became incapable of performing any duty or duties in the police service to which he can be and shall be assigned.

The disability begins to exist only when the policeman becomes incapable of performing police duties.

Citation:

Statute: Policemen's Annuity and Benefit act, secs. 12, 46.

ORDINARY DISABILITY BENEFITS IF SALARY RECEIVED DURING DISABILITY

(No. 8766—*Retirement Board, Policemen's Annuity and Benefit Fund*—*G. F. M.*—*May 14, 1935—2 pp.*)

An ordinary disability benefit to be paid to a policeman, who received a salary during a part of the period that he has been disabled, should be computed on the same basis as if disability payments had begun at the date the disability commenced.

Citation:

Statute: *Policemen's Annuity and Benefit Fund act*, sec. 46.

DISABILITY BENEFITS TO DISCHARGED EMPLOYEE

(No. 8297—*Retirement Board, Policemen's Annuity and Benefit Fund*—*G. F. M.*—*February 14, 1934—1½ pp.*)

Disability benefits can be granted only to policemen in the service, and not to discharged policemen.

The question of whether a policeman was wrongfully discharged is for the Civil Service Commission or the courts to decide and is no concern of the Retirement Board.

DISABILITY BENEFITS DUE INSANE POLICEMAN

(No. 7162—*Retirement Board, Policemen's Annuity and Benefit Fund*—*G. F. M.*—*October 2, 1931—2½ pp.*)

The Retirement Board of the Policemen's Annuity and Benefit Fund has the power to waive conservatorship proceedings in the case of an insane policeman entitled to an ordinary disability benefit from the fund, and may pay his benefit payments to a blood relative who is providing for or caring for such insane policeman, particularly when the policeman has designated this relative as attorney-in-fact to receive the payments.

Citation:

Statute: *Policemen's Annuity and Benefit Fund act*, sec. 59½, as amended July 1, 1929.

DISABILITY BENEFITS PAYMENTS TO CONSERVATRIX

(No. 8241—*Retirement Board, Policemen's Annuity and Benefit Fund*—*G. F. M.*—*December 14, 1933—1½ pp.*)

Disability payments from the Policemen's Annuity and Benefit Fund should be paid to a conservatrix appointed by the court until the Probate Court discharges the conservatrix or orders payments made directly to a beneficiary, regardless of a county court order directing release of the beneficiary from an institution.

REINSTATEMENT WHEN DISABILITY CEASES

(No. 7883—*Commissioner of Police—G. F. M.—January 5, 1933—*
2½ pp.)

A policeman receiving a disability pension under the Police Pension Fund act of 1915 must be taken off the pension list when the disability ceases, but he is entitled to be immediately reinstated in the rank held by him at the time of his retirement. Such policeman, if not reinstated upon application is entitled to be paid a salary from the date of his application for reinstatement until he was assigned to active duty.

Citations:

Statutes: Ill. Laws (1917), p. 276 (Police Pension Fund, 1915, sec. 4).

Id. (1921), p. 303 (Policemen's Annuity and Benefit Fund act, sec. 50).

(5) *Specific Benefits—Widows*

POLICE PENSION FUND, TIME LIMIT ON APPLICATION FOR WIDOW'S PENSION

(No. 6640—*Retirement Board, Policemen's Annuity and Benefit Fund—G. F. M.—April 12, 1930—3 pp.*)

The widow of a pensioned policeman cannot receive a pension under the Police Pension Fund act of 1915 unless she applies for the pension within one year of the death of her husband.

Citations:

Statutes: Police Pension Fund act (1915), as amended (1917), sec. 6.
Policemen's Annuity and Benefit Fund act (1921), sec. 50.

Opinion No. 6663 of May 9, 1930, to the Retirement Board, Policemen's Annuity and Benefit Fund is in accord with the above opinion.

POLICE PENSION FUND, WIDOW'S PENSION RIGHTS UPON REMARRIAGE

(No. 8667—*Retirement Board, Policemen's Annuity and Benefit Fund—G. F. M.—February 8, 1935—2½ pp.*)

If a deceased policeman's wife marries, she loses all right to receive a widow's pension and this right is in no way restored by a subsequent divorce from her second husband.

Citations:

Statutes: Ill. Laws (1915), p. 305 (Policemen's Pension Fund act, 1915, sec. 3), as amended, Ill. Laws (1917), p. 278, sec. 6.
Policemen's Annuity and Benefit Fund act (1921), secs. 50, 57.

WIDOW'S ANNUITY RIGHTS IF MARRIAGE AFTER EMPLOYEE'S ANNUITY FIXED

(No. 8564—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—November 19, 1934—2 pp.)

The widow of a policeman who married him subsequent to January 1, 1922, after he had entered upon an annuity is not entitled to a widow's annuity, if the husband did not subsequently reenter the service.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, sec. 38, par. b.

WIDOW'S ANNUITY IF MARRIAGE TO AN ANNUITANT WHO REENTERS THE SERVICE

(No. 8210—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—November 13, 1933—2½ pp.)

The widow of a deceased member of the Police Department is entitled to a widow's annuity from the Policemen's Annuity and Benefit Fund if she married him after January 1, 1922, and was his wife during the period in which he was in service and before he attained the age of 57, despite the fact that she married him at a time while he was out of the service and was receiving an annuity.

Her annuity should be such as can be granted under section 22 of the Policemen's Annuity and Benefit Fund act, or under section 56 of that act as modified by section 59½, whichever provides the larger annuity.

Citations:

Statute: Policemen's Annuity and Benefit Fund act, secs. 22, 56, 59½.

Other reference: Opinion No. 6560 (this volume, p. 315).

RIGHTS TO WIDOW'S ANNUITY WHEN DIVORCED AT EMPLOYEE'S DEATH

(No. 8565—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—November 19, 1934—2 pp.)

The wife of a policeman, divorced from him at the time of his death, is not entitled to a widow's annuity.

RIGHTS TO WIDOW'S ANNUITY ACCUMULATIONS FOR FORMER WIFE

(No. 6596—*Retirement Board, Policemen's Annuity and Benefit Fund*—*G. F. M.*—January 31, 1930—4 pp.)

When a policeman marries during the period between his separation from the service and his re-entrance, his wife does not receive the benefit of any accumulations of annuity deductions made from the policeman's salary for a previous wife from whom he was divorced before his separation from the service.

The Retirement Board of the Policemen's Annuity and Benefit Fund cannot accept, as a credit on an annuity for his second wife, the return by the policeman of accumulated annuity deductions for a previous wife, which were refunded to him at the time of his separation from the service, he having been divorced before that separation.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, secs. 22, 23, 34.

EFFECT OF PRIOR VOID MARRIAGE ON WIDOW'S ANNUITY RIGHTS

(No. 8211—*Retirement Board, Policemen's Annuity and Benefit Fund*—*G. F. M.*—November 13, 1933—1½ pp.)

The right of the widow of a participant in the Policemen's Annuity and Benefit Fund to an annuity as the widow of that participant is not affected by her earlier marriage to another man, where that marriage was void.

POLICE PENSION FUND, WIDOW'S PENSION RIGHTS OF COMMON LAW WIFE

(No. 8314—*Retirement Board, Policemen's Annuity and Benefit Fund*—*G. F. M.*—February 21, 1934—2½ pp.)

A common law marriage entered into in a state which allows this type of marriage and at a time prior to July 1, 1905, is a legal marriage in Illinois and the widow of a policeman who was so married, is entitled to a widow's pension.

Citations:

Statutes: SH '33, p. 1831.

SH '33, 121: 4.

Case: Lorimer v. Lorimer, 124 Mich. 631 (1900).

WIDOW'S ANNUITY RIGHTS WHEN FIRST MARRIAGE INVALID AND SUBSEQUENT REMARRIAGE

(No. 8889—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—October 1, 1935—1½ pp.)

A woman is entitled to an annuity as the widow of a deceased policeman where the deceased policeman contracted an invalid marriage with her, because he had not divorced his first wife, if he subsequently remarried her after divorcing both his first wife and her.

Citation:

Statute: *Policemen's Annuity and Benefit Fund act*, sec. 20.

EFFECT OF MARRIAGE AFTER DISABILITY INCURRED ON WIDOW'S COMPENSATION ANNUITY

(No. 8619—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—January 10, 1935—3 pp.)

The widow of a disabled policeman, even though she became the wife of a disabled policeman after the date of his disability, is entitled to a widow's compensation annuity, if the Retirement Board should find that the death of the policeman resulted from an injury received by him in the performance of his duty.

Citation:

Statute: *Policemen's Annuity and Benefit Fund act*, secs. 32, 33.

Note: The law in this matter was changed subsequent to the date of this opinion by amendment to the act.

POLICE PENSION FUND, AMOUNT OF WIDOW'S PENSION WHEN POLICEMAN'S DEATH CAUSED BY DUTIES

(No. 6581—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—January 9, 1930—2 pp.)

The widow of a policeman is not entitled to a maximum pension merely because her husband died from a disease resulting from exposure to the elements while on traffic duty. This is not death due to injury or injuries.

Citation:

Statute: Ill. Laws (1917), p. 277 (*Police Pension Fund act 1915*, sec. 5, as amended).

WIDOW'S ANNUITY RIGHTS IF POLICEMAN MARRIES WHEN OVER FIFTY-SEVEN YEARS OF AGE

(No. 7561—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—May 4, 1932—1½ pp.)

The widow of any policeman who married him after he had attained the age of fifty-seven years cannot for that reason alone be denied an annuity, if the marriage occurred prior to the coming into effect of the Policemen's Annuity and Benefit Fund act of 1921.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, secs. 20, 38.

WIDOW'S ANNUITY WHEN MARRIAGE AFTER POLICEMAN IS FIFTY-SEVEN YEARS OF AGE

(No. 6560—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—December 11, 1929—3 pp.)

A woman who married a policeman over fifty-seven years of age on a date subsequent to the date the Policemen's Annuity and Benefit Fund act came in force, is not entitled to a widow's annuity at the death of her husband.

Citations:

Statute: Policemen's Annuity and Benefit Fund act, secs. 38, 53, 59.

Case: Pecoy v. Chicago, 265 Ill. 78 (1915).

Opinion No. 8866 of September 5, 1935, to the Retirement Board, Policemen's Annuity and Benefit Fund is in accord with the above opinion.

RIGHTS OF WIDOW WHO DIVORCES AND REMARRIES POLICEMAN ON PENSION

(No. 7966—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—March 14, 1933—2½ pp.)

A woman who married a policeman more than one year before a pension was granted to him, who was divorced by him subsequent to his receiving a pension and then later remarried to him, will be entitled to a full widow's pension should she survive him as his wife.

Pension laws should be liberally construed in favor of those who are to be benefited.

Citations:

Statutes: Policemen's Annuity and Benefit Fund act, secs. 38, 50.

Police Pension Fund act (1915), sec. 3(b).

Case: Colton v. Board of Trustees, 287 Ill. 56 (1919).

RIGHT TO RECEIVE BOTH WIDOW'S AND SERVICE ANNUITIES

(No. 7092—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—August 25, 1931—2½ pp.)

A police matron who is a widow of policeman, is entitled to receive both a widow's annuity as such widow, and an age and service annuity based upon her own services in the Police Department.

Citation:

Statute: Policemen's Annuity and Benefit Fund act of 1921, secs. 1, 12, 20, 21-25, 30, 37, 51, 55.

WIDOW'S PENSION UNDER ACT OF 1887

(No. 7780—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—October 18, 1932—1½ pp.)

The pension rights of a policeman or his wife are fixed by the act in effect at the time of his resignation.

A policeman's widow is not entitled to a pension under the act of 1887 unless the policeman died as a result of the performance of an act of duty or after ten years of service in the Police Department while still in the service.

Citation:

Statute: Policemen's Pension act (1887), sec. 6 (as amended May 16, 1903).

POLICE PENSION FUND—PENSION RIGHTS OF WIDOW OF DISABLED PENSIONER

(No. 8247—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—December 19, 1933—2 pp.)

Under existing law, the widow of a pensioner under the Police Pension act of 1915 has her pension rights determined by that act.

Under the act of 1915, the widow of a deceased disabled pensioner shall be paid the same pension as was being paid to her husband provided she married him before he became disabled, but if she married him after he became disabled, she is not entitled to a pension.

Citations:

Statutes: Policemen's Pension act (1915), sec. 4.

Policemen's Annuity and Benefit Fund act, secs. 12, 50.

Cases: Hughes v. Traeger, 264 Ill. 612 (1914).

Pecoy v. Chicago, 265 Ill. 78 (1915).

POLICE PENSION FUND, PENSION RIGHTS OF WIDOW OF PENSIONER

(No. 7009—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—July 14, 1931—2 pp.)

The widow of a policeman pensioned under the Police Pension Fund act of 1915 can receive a widow's pension on his death only if her marriage to him had occurred more than six months prior to the time a pension had been granted to him.

A widow of a policeman is not entitled to a pension or an annuity under the Policemen's Annuity and Benefit Fund act if she was not the wife of such policeman while he was in the service and before he attained the age of fifty-seven.

Citations:

Statutes: Police Pension Fund act of 1915, sec. 3.
Policemen's Annuity and Benefit Fund act, secs. 38, 50.

(6) *Special Benefits—Children*

POLICE PENSION FUND, ACT DETERMINING CHILD'S PENSION

(No. 6856—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—March 30, 1931—3 pp.)

The child of a police pensioner acquires pension rights under the act in force and effect at the time the conditions occur which cause the child to become entitled to a pension, namely, the death of the pensioner.

Citations:

Statutes: Police Pension Fund act of 1887, sec. 3, as amended 1911.
Police Pension Fund act of 1915, sec. 3, as amended 1917.
Policemen's Annuity and Benefit Fund act, 1921, sec. 50.

Case: Hughes v. Traeger, 264 Ill. 612 (1914).

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion as to the amount of pension properly payable a minor whose father was a pensioner under the act of 1887, as amended, the following is submitted:

Your letter states that Herman C. Ruthenberg was appointed to the police department on June 20, 1890, and resigned effective January 1, 1915; that his term of net police service was twenty-two (22) years, ten (10) months and sixteen (16) days; that he was awarded a pension of half salary in the amount of six hundred sixty (\$660.00) dollars per year; that on to-wit: January 2, 1917, a daughter, Arline Ruthenberg, was born to Mrs. Ruthenberg; that the mother of this child died on November 11, 1920; that Ruthenberg again married on November 12, 1921; that Ruthenberg died January 26, 1930; and that his present widow has applied for the pension of Arline Ruthenberg.

Section 3 of the Police Pension act of 1887, as amended in 1911, was in force and effect at the time of the resignation of Herman C. Ruthenberg and was the act under which he was pensioned. This section provided, among other things, that the child under sixteen (16) years of age of any deceased pensioner should receive the same pension theretofore received by such deceased father.

In 1915 a new Police Pension Fund act was passed, which provided, in Section 3 thereof, that the children of a retired policeman, in the event there was no widow entitled to a pension, should receive the same pension theretofore received by the deceased father, to be divided equally among them.

Section 12 of the Police Pension Fund act of 1915 specifically provided that the act of 1915 should supersede the act of 1887 and that persons entitled to or receiving pensions under the act of 1887 should receive no further payment under that act but should, in lieu thereof, be entitled to the benefits provided in the act of 1915. Up to this time Arline Ruthenberg had not as yet been born.

In 1917 Section 3 of the Police Pension Fund act of 1915 was amended to read as follows:

"Should any policeman pensioned hereunder leave no widow surviving him, or should his widow die before his children arrive at the age of eighteen (18) years, each child shall receive, while regularly attending school, the sum of fifteen (\$15.00) dollars per month. Pensions paid to children shall cease as to any such child upon his or her arriving at the age of eighteen (18) years."

In 1921 the present Policemen's Annuity and Benefit Fund act was passed, and Section 50 of the latter act provides that children, less than eighteen (18) years of age, of policemen who are pensioners under the act of 1915 and who shall die, shall have a right to receive pensions in accordance with the provisions of the act of 1915. At the time the present Policemen's Annuity and Benefit Fund act came into force and effect Mr. Ruthenberg was a pensioner under the act of 1915 by reason of the preservation in the act of 1915 of his rights as a pensioner under the act of 1887. Arline Ruthenberg did not become entitled to a pension nor did she have any right to a pension until her father died, so that any rights which Arline Ruthenberg might have to a pension became fixed by the act in force and effect at the time the conditions occurred which caused her to become entitled to a pension, namely, the death of her father (Hughes v. Traeger, 264 Ill. 612). The law so in force and effect at the time Arline Ruthenberg became entitled to a pension was the present Policemen's Annuity and Benefit Fund act, and the only pension provided for her by this act is set out in Section 50 hereinbefore referred to, viz.: the pension provided for children in the act of 1915, as amended in 1917, which pension we have seen is in the amount of fifteen (\$15.00) dollars per month while such child is attending school.

I am of the opinion that the child of a police pensioner becomes entitled, at the death of said pensioner, to only such pension as is provided by the law in force and effect at the time such police-pensioner-father dies, and that in the instant case the child, Arline Ruthenberg, is entitled to a pension of only fifteen (\$15.00) dollars per month.

* * * * *

CHILD'S ANNUITY WHEN MARRIAGE OCCURRED AFTER RETIREMENT

(No. 7611—*Retirement Board, Policemen's Annuity and Benefit Fund*—G. F. M.—June 16, 1932—2 pp.)

No pension or annuity rights exist for a policeman's child born to a wife which the policeman married after he had retired on a pension.

Citations:

Statutes: Police Pension Fund act (1915, as amended 1917), sec. 3(b).
Policemen's Annuity and Benefit Fund act, sec. 44.

Opinion No. 8659 of February 1, 1935, to the Retirement Board of the Policemen's Annuity and Benefit Fund is in accord with the above opinion.

ANNUITY RIGHTS OF ADOPTED CHILD

(No. 6881—*Policemen's Annuity and Benefit Fund*—G. F. M.—April 29, 1931—1 p.)

An adopted child is not entitled to a child's annuity under the provisions of the Policemen's Annuity and Benefit Fund act.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, sec. 44.

CHILD'S ANNUITY FOR ILLEGITIMATE CHILDREN

(No. 7091—*Retirement Board, Policemen's Annuity and Benefit Fund*—G. F. M.—August 25, 1931—1½ pp.)

Illegitimate children of a policeman are not entitled to be paid "child's annuity," irrespective of an acknowledgment of their fatherhood by such policeman.

Citations:

Statute: Policemen's Annuity and Benefit Fund act, sec. 43.
Case: Blacklaws v. Mills, 82 Ill. 505 (1876).

SALARY BASIS OF CHILD'S DISABILITY AND DUTY DISABILITY BENEFITS

(No. 8191—*Retirement Board, Policemen's Annuity and Benefit Fund*—G. F. M.—October 16, 1933—3 pp.)

A child's disability benefit to an injured policeman must be based on the actual appropriated salary of such policeman, but his policeman's duty disability benefit from the Policemen's Annuity and Benefit Fund may be based on his salary at the time of the injury provided that such salary shall be assumed to be not less than that on July 1, 1931.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, as amended April 25, 1933, secs. 12, 45.

TO WHOM CHILD'S ANNUITY PAYABLE

(No. 8873—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—September 17, 1935—2 pp.)

A child's annuity should be paid to the legal guardian or custodian of the child appointed by the court for its care and maintenance, where a guardian or custodian is so appointed.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, sec. 44.

PAYMENT OF CHILD'S ANNUITY WHEN CHILD IN CUSTODY OF STATE OR COURT

(No. 7560—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—May 4, 1932—2 pp.)

Whenever a minor child of a deceased policeman who is entitled to child annuity payment and is in the custody of a state institution or of the Juvenile Court, a guardian should be appointed to manage and protect the minor's estate.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, secs. 44, 59½.

PAYMENT OF CHILD'S ANNUITY WITHOUT GUARDIANSHIP PROCEEDINGS

(No. 8872—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—September 17, 1935—3 pp.)

The Retirement Board of the Policemen's Annuity and Benefit Fund may waive guardianship proceedings and pay a child's annuity and the portion of a refund due the child as his father's heir to the person providing and caring for him as a minor.

Citations:

Statutes: ISBS '35, 24: 910.

Policemen's Annuity and Benefit Fund act, sec. 39(e).

WITHHOLDING CHILD'S ANNUITY FOR OVERPAYMENTS OF WIDOW'S ANNUITY

(No. 6935—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M.—June 5, 1931—2½ pp.)

Where there has been an overpayment of widow's annuity to a woman, further payments of a child's annuity to her should be withheld and applied against such overpayments, which overpayments may be interpreted as an advance of the monies payable for the support of the parent and her children.

Citation:

Statute: Policemen's Annuity and Benefit Fund act, sec. 44.

Opinion No. 7090 of August 25, 1931, to the Retirement Board of the Policemen's Annuity and Benefit Fund is in accord with the above opinion.

E. FIREMEN'S ANNUITY AND BENEFIT FUND

(1) *Scope*

RIGHTS UPON CLASSIFICATION IN FIRE SERVICE

(No. 7285—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—November 10, 1931—1 p.*)

An employee whose position has been classified in the Fire Department is entitled to a service credit in the Firemen's Annuity and Benefit Fund from the date of the classification in the Fire Department, subject to section 51 of that act, and, provided that he has made, or now makes, the proper contributions for all periods of time since that date.

Citations:

Statutes: Firemen's Pension Fund act (1917), sec. 13.

Firemen's Annuity and Benefit Fund act, sec. 51.

Opinion No. 7232 of October 29, 1931, to the Retirement Board of the Firemen's Annuity and Benefit Fund is in accord with the above opinion.

RIGHTS UPON TRANSFER FROM MUNICIPAL TO FIRE SERVICE

(No. 7331—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—November 30, 1931—2 pp.*)

An employee who was formerly employed in the municipal service becomes a member of the Firemen's Annuity and Benefit Fund and ceases to be a member of the Municipal Employees' Annuity and Benefit Fund upon appointment or promotion to a position classified in the fire service.

Where the above employee has taken a refund of monies paid into the Municipal Employees' Annuity and Benefit Fund, he has surrendered his right to any credit in that fund unless he should later re-enter the municipal service.

Citations:

Statutes: Firemen's Pension Fund act (1917), sec. 13.

Municipal Employees' Annuity and Benefit Fund act, sec. 39(a).

PARTICIPATION OF TEMPORARY APPOINTEES IN FUND

(No. 8190—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—October 16, 1933—1 p.*)

A temporary appointee is not properly a participant in the Firemen's Annuity and Benefit Fund under the present act.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, sec. 61.

FIREMEN'S PENSION FUND, PARTICIPATION OF TEMPORARY APPOINTEE

(No. 7279—Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—November 9, 1931—1 p.)

All persons appointed to any position classified by the Civil Service Commission as in the fire service, come within meaning of the term "fireman" as contained in Firemen's Pension Fund act of 1917, even though the appointment is temporary, and they are entitled to enter the Firemen's Pension Fund at that time.

An employee appointed to a position classified as in the fire service prior to July 1, 1931, is entitled to service credit in the Firemen's Annuity and Benefit Fund beginning with the date of his appointment and subject to Section 51 of that act.

Citations:

Statutes: Firemen's Pension Fund act (1917), sec. 13.
Firemen's Annuity and Benefit Fund act, sec. 51.

FIREMEN'S PENSION FUND, SALARY DEDUCTIONS OF TEMPORARY APPOINTEE

(No. 6539—City Comptroller—G. F. M.—November 9, 1929—1 p.)

Deductions are to be made and paid into the Firemen's Pension Fund from the salary of all persons who have been appointed to any position classified by the Civil Service Commission in the city's fire service, with the single exception that no deduction shall be made from the salary of any person appointed to temporary service in the Fire Department, when the person is a member of any other pension fund or annuity and benefit fund of the city and is contributing to that fund.

FIREMEN'S PENSION FUND, PARTICIPATION OF MACHINIST CLASSIFIED IN MUNICIPAL SERVICE

(No. 6774—Board of Trustees, Firemen's Pension Fund—G. F. M.—September 24, 1930—2½ pp.)

An automobile machinist is classified by the Civil Service Commission as a general city employee, and the employment of such a machinist in the Fire Department or his payment from the Fire Department's payroll does not constitute employment in the "fire service" so as to subject him to the Firemen's Pension Fund act.

Citation:

Statute: Firemen's Pension Fund act, sec. 13.

PARTICIPATION OF MEMBER OF FIREMEN'S PENSION FUND IN ANNUITY AND BENEFIT FUND

(No. 7195—*Retirement Board, Firemen's Annuity and Benefit Fund—
G. F. M.—October 17, 1931—2 pp.*)

A Fire Department employee who was a participant in the Firemen's Pension Fund which was superseded by the Firemen's Annuity and Benefit Fund is included within the provisions of the Firemen's Annuity and Benefit Fund act and is within the definition of "firemen" as contained in the act.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, secs. 12, 51.

PARTICIPATION OF FIRE DEPARTMENT MEMBERS AND PROBATIONERS

(No. 8765—*Retirement Board, Firemen's Annuity and Benefit Fund—
G. F. M.—May 14, 1935—2½ pp.*)

Members of the Fire Department, including probationary firemen, cannot be excluded from participation in the Firemen's Annuity and Benefit Fund, with the exception that their right to receive ordinary disability benefits are contingent upon certification of physical fitness by the Retirement Board's physician.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, secs. 1, 6, 12, 47.

RIGHTS OF PENSION FUND PARTICIPANT IN ANNUITY AND BENEFIT FUND

(No. 7360—*Retirement Board, Firemen's Annuity and Benefit Fund—
G. F. M.—December 9, 1931—3 pp.*)

An employee who was a participant in the Firemen's Pension Fund which preceded the passage of the 1917 act and who has continued to contribute is entitled to a service credit in the Firemen's Annuity and Benefit Fund from the date of his first participation in the earlier fund, subject, however, to section 51 of the present act, even though he has never been in a position specifically classified in the fire service. No credit is to be given to him, however, for any period of time during which he failed to make proper contribution, unless he makes up any deficiency upon being notified.

Citations:

Statutes: Firemen's Pension Fund act (1917), sec. 13.

Firemen's Annuity and Benefit Fund act, secs. 12, 51.

Opinions No. 7254 and No. 7255, both of November 4, 1931, and No. 7428 of January 20, 1932, to the Retirement Board, Firemen's Annuity and Benefit Fund are in accord with the above opinion.

RIGHTS OF ASSISTANT TELEGRAPH OPERATOR RECLASSIFIED INTO FIRE SERVICE

(No. 7246—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—November 2, 1931—1½ pp.*)

The position of assistant telegraph repairer was classified in the fire service for the first time on February 5, 1923. A person holding the position at that time, is entitled to a service credit in the Firemen's Annuity and Benefit Fund from that date, subject to the provisions of section 51 of the Firemen's Annuity and Benefit Fund act. No service credit, however, should be given him for any period during which he received his salary but failed to make the requisite contributions into the fund, unless he shall make up the deficiency.

Citations:

Statutes: Firemen's Pension Fund act (1917), sec. 13.
Firemen's Annuity and Benefit Fund act, sec. 51.

PARTICIPATION OF EMPLOYEE TRANSFERRED OUT OF FIRE SERVICE

(No. 8023—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—April 20, 1933—2 pp.*)

An employee who was involuntarily transferred from the Fire Department to the Department of Gas and Electricity and who was a participant in the Firemen's Pension Fund less than five years and ceased to be such participant prior to July 1, 1931, cannot now become a participant in the Firemen's Annuity and Benefit Fund but belongs in the Municipal Employees' Annuity and Benefit Fund.

Citations:

Statute: Firemen's Annuity and Benefit Fund act, sec. 52.

RIGHTS OF PARTICIPANT TRANSFERRED OUT OF FIRE SERVICE

(No. 7079—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—August 20, 1931—2½ pp.*)

Under the Firemen's Pension Fund act of 1917, a rightful contributor to the Firemen's Pension Fund who, prior to his transfer out of the fire service and thereafter continued to contribute into said fund his usual salary deductions when the present Firemen's Annuity and Benefit Fund Act came into effect, is entitled to participation under the existing act.

Citations:

Statutes: Firemen's Annuity and Benefit Fund act, sec. 1.
Firemen's Pension Fund act of 1917, sec. 13.

(2) *General Rights*

SALARY BASIS FOR COMPUTING ANNUITIES AND BENEFITS

(No. 7366—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—December 10, 1931—2 pp.*)

The highest annual salary actually paid to and received by a fireman is the basis of computing the maximum annuity to which he is entitled in the Firemen's Annuity and Benefit Fund.

The \$3000.00 limitation in section 12 of the Firemen's Annuity and Benefit Fund act, is to be used as a basis for computing only the prior service annuity, the widow's annuity, the widow's prior service annuity, and the child's annuity. The annual salary of an employee is to be used when considering the age and service annuity, the minimum annuity, and disability benefit.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, secs. 12, 15, 18, 37, 50.

INTERPRETATION OF "SALARY" FOR PURPOSES OF FUND

(No. 7605—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—June 14, 1932—3½ pp.*)

The word "salary" as used in section fifty-six of the Firemen's Annuity and Benefit Fund act is to be construed in any year as meaning the salary fixed for the respective ranks and grades in the Fire Department by the city's annual appropriation bill for that year.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, secs. 12, 16-22, 46, 56.

RIGHTS TO REFUNDS OF SALARY DEDUCTIONS

(No. 6520—*Board of Trustees, Firemen's Pension Fund—G. F. M.—October 8, 1929—2 pp.*)

Salary deductions that are paid into a pension fund are not the property of the employee from whose salary they are deducted.

When salary deductions for a pension fund are properly made, they cannot be refunded to the employee from whose salary they were made unless the act creating the fund specifically so provides.

Citation:

Case: *Pecoy v. Chicago*, 265 Ill. 78 (1915).

RIGHT TO BENEFITS UNDER PREVIOUS ACT

(No. 7186—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—October 13, 1931—3½ pp.*)

Although the Firemen's Annuity and Benefit Fund act, superseded the Firemen's Pension Fund act, those who were members of the latter fund at the time the new act came into effect do not lose any of the rights or benefits held under the former act and a fireman holding such rights or benefits who is about to be retired for disability is entitled to the benefits provided under the Firemen's Pension Fund act.

Citations:

Statutes: Firemen's Pension Fund act (1917), sec. 9.
Firemen's Annuity and Benefit Fund act (1931), sec. 52.

PERIODS OF SERVICE INCLUDED FOR SERVICE CREDITS

(No. 7196—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—October 17, 1931—2 pp.*)

A person who was a fireman under either a temporary or permanent appointment under the provisions of the Firemen's Pension Fund act of 1917 and continued to be a fireman up to and on the day that the Firemen's Annuity and Benefit Fund act of 1931 came into effect is entitled to be credited with a service credit from the date of his appointment of an amount as provided in the 1931 act including the time during which he performed the duties of his position, all periods of vacation, all periods of leave of absence with whole or part pay which were necessary on account of disability and all periods of leave of absence during which he was engaged in the military or naval service of the United States of America, if any, but not including a service credit for any period during which he received a disability pension under the Firemen's Pension Fund act of 1917.

Citations:

Statutes: Firemen's Pension Fund act (1917), sec. 13.
Firemen's Annuity and Benefit Fund act (1931), sec. 51.

Opinions No. 7204 and 7208, both of October 22, 1931, and No. 7222 of October 27, 1931, to the Retirement Board, Firemen's Annuity and Benefit Fund are in accord with the above opinion.

SERVICE CREDITS OF CONTRIBUTOR TO PREVIOUS FIREMEN'S PENSION FUNDS

(No. 7271—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—November 7, 1931—3 pp.*)

A fireman who has been a continuous participant of succeeding firemen's pension funds since November 7, 1889 is entitled to a service

credit in the Firemen's Annuity and Benefit Fund from that date, subject, however, to section 51 of the Firemen's Annuity and Benefit Fund act and to the provision that no service credit should be given for any period during which he did not contribute to the several firemen's pension funds, unless he makes up the deficiency upon being notified.

Citations:

- Statutes: Firemen's Pension Fund act (1887), sec. 11, as amended (1907).
Firemen's Pension Fund act (1915), sec. 1.
Firemen's Pension Fund act (1917), sec. 13.
Firemen's Annuity and Benefit Fund act, secs. 12, 51.

**SERVICE CREDITS OF EMPLOYEE TRANSFERRED OUT OF
FIRE SERVICE TO POSITION RECLASSIFIED IN
FIRE SERVICE**

(No. 7277—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—November 9, 1931—2 pp.*)

An employee who holds a position when it is first classified in the fire service is entitled to a service credit in the Firemen's Annuity and Benefit Fund from the date of the classification, or if the position is already classified, he is entitled to become a participant in the fund as soon as he is appointed.

When an employee is involuntarily transferred from a position classified in the fire service to one not so classified at that time but which is later changed to the fire service, he is entitled to a continuous participation in the Firemen's Annuity and Benefit Fund, subject to section 51 of that act, but if the transfer was voluntary, he is not entitled to such participation for the period extending from the date of the transfer to the date of reclassification; but no credit is to be given for any period of time during which he was in receipt of his salary and failed to make the proper contributions, unless he pays up the deficiency after notice is given to him.

Citations:

- Statutes: Firemen's Pension Fund act (1917), sec. 13.
Firemen's Annuity and Benefit Fund act, sec. 51.

SERVICE CREDITS OF EMPLOYEE WHOSE POSITION CLASSIFIED IN "FIRE SERVICE"

(No. 7284—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—November 10, 1931—1½ pp.*)

An employee who held a position at the time it was classified in the fire service is entitled to a service credit in the Firemen's Annuity and Benefit Fund beginning with the date of this classification, subject,

however, to section 51 of that act, but no credit is to be given for any period of time during which he failed to make proper contributions, unless he pays the deficiency upon being notified.

Citations:

Statutes: Firemen's Pension Fund act (1917), sec. 13.
Firemen's Annuity and Benefit Fund act, sec. 51.

Opinions No. 7282 and 7283, both of November 10, 1931, and Opinions No. 7275 of November 9, 1931, and No. 7233 of October 30, 1931, all to the Retirement Board, Firemen's Annuity and Benefit Fund, are in accord with the above opinion.

SERVICE CREDIT OF FIREMAN SERVING IN MUNICIPAL SERVICE

(No. 8004—*Retirement Board, Fireman's Annuity and Benefit Fund—G. F. M.—April 7, 1933—1½ pp.*)

A fireman who served as a chauffeur in the City Electrical Department is not entitled to service credit for that period in the Firemen's Annuity and Benefit Fund.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, sec. 51.

SERVICE CREDITS OF EMPLOYEE UNLAWFULLY DISCHARGED

(No. 8734—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—March 27, 1935—2 pp.*)

An employee whose discharge has been nullified by a court order is considered as having been continuously in the service from the time he was unlawfully discharged until the time he was reinstated, and his service credits should be recomputed to include that period of time, upon his paying into the fund the amount of his pension contributions for any period so credited.

Opinion No. 6519 of October 8, 1929, to the Fire Commissioner is in accord with the above opinion.

(3) Specific Benefits—Retirement

COLLECTING SALARY CONTRIBUTION BEFORE CREDITING SERVICE AND RETIREMENT RIGHTS

(No. 7877—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—January 4, 1933—2 pp.*)

The Retirement Board of the Firemen's Annuity and Benefit Fund must collect unpaid salary contributions before crediting a participant

with age and service retirement rights, or with prior service accumulations, for the period of time during which he did not so contribute.

Citation:

Case: *Carpenter v. Chicago*, 199 Ill. App. 558 (1917).

Opinion No. 8545 of October 29, 1934, to the Retirement Board, Firemen's Annuity and Benefit Fund, is in accord with the above opinion.

RETIREMENT BOARD'S POWER TO RETIRE DISABLED FIREMEN

(No. 7194—*Retirement Board, Firemen's Annuity and Benefit Fund*—*October 16, 1931—3½ pp.*)

The Retirement Board of the Firemen's Annuity and Benefit Fund has power to order the retirement of any disabled "present employee" fireman in accordance with the provisions of the Firemen's Pension Fund act. This power does not depend upon the filing of an application for retirement by the fireman himself but may also be exercised by the board upon the filing of an application by the chief officer of the Fire Department supported by proper evidence establishing the necessity for such action.

Citations:

- Statutes:** Firemen's Pension Fund act (1917), secs. 2, 9.
Firemen's Annuity and Benefit Fund act (1931), sec. 52.
- Cases:** *People v. Wallace*, 291 Ill. 465 (1920).
Gibson v. Ackermann, 70 Ill. App. 399 (1896-97).
Hunt v. Chicago Horse and Dummy Railroad, 121 Ill. 638 (1886-87).
Chicago v. Quimby, 38 Ill. 274 (1865).
People v. Wabash Railroad, 276 Ill. 92 (1917).
Edwards v. Edwards, 145 Ill. App. 457 (1909).
People v. Raymond, 186 Ill. 407 (1900).

ANNUITY OF FIREMEN OVER FIFTY YEARS OF AGE WITH TWENTY YEARS' SERVICE

(No. 7082—*Retirement Board, Firemen's Annuity and Benefit Fund*—*G. F. M.—August 20, 1931—2 pp.*)

A present employee, retiring from the Fire Department after more than twenty years of service and the attainment of the age of fifty years or upward, is entitled to receive an annuity amounting to not less than fifty per cent of the salary he received on the day one year prior to the date of his separation from the service.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, sec. 56.

SALARY BASIS OF EMPLOYEE PAID DAILY WAGE

(No. 7656—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—July 19, 1932—1½ pp.*)

The annual salary of an employee paid a daily wage should be computed for annuity purposes for the Firemen's Annuity and Benefit Fund by multiplying his daily wage by the number of working days in the year, excluding overtime, Sundays, fifty-two half days for Saturdays and six holidays.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, sec. 40.

DISABILITY RETIREMENT PENSIONS AND BENEFITS

(No. 7684—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—August 2, 1932—2½ pp.*)

By virtue of section 52 of the Firemen's Annuity and Benefit Fund, a "present employee" may retire, if so disabled that retirement from active service is necessary, under the Pension Act of 1917 on a pension equal to one-half his salary at the time of his retirement; such pension is not subject to deductions, whereas ordinary disability benefits under the Firemen's Annuity and Benefit Fund act are subject to the usual salary deductions for annuity purposes.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, secs. 47, 52.

PRORATING ANNUITY OR PENSION AS OF DATE OF DEATH

(No. 8445—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—June 27, 1934—2½ pp.*)

Because of its actuarial basis, an annuity granted under the Firemen's Annuity and Benefit Fund act cannot be prorated as of the date of the death of an annuitant should such death occur before the time when payment falls due.

Pensions granted in accordance with the provisions of the Firemen's Pension Act of 1917 are prorated as of the date of the death of pensioner, if such death occurs before the time when such payment would otherwise be due and payable, because these pensions are gifts or gratuities of the government and are not based on actuarial accumulations.

Citations:

Statutes: Firemen's Pension act (1917), sec. 8.

Firemen's Annuity and Benefit Fund act, sec. 52.

Opinions No. 7081 of August 20, 1931, and No. 8043 of May 3, 1933, both to the Retirement Board, Firemen's Annuity and Benefit Fund are in accord with the above opinion.

(4) *Specific Benefits—Disability*

DISABILITY PENSION TO DISCHARGED FIREMEN

(No. 6549—*Board of Trustees, Firemen's Pension Fund—G. F. M.—November 22, 1929—3 pp.*)

The Board of Trustees of the Firemen's Pension Fund may not grant a disability pension to a fireman who has been discharged by the Civil Service Commission, and is no longer in the service.

Citations:

Statute: Firemen's Pension Fund act, sec. 9.

Case: People v. Abbot, 274 Ill. 380, 386 (1916).

DISABILITY PENSION TO FIREMEN NOT IN ACTIVE SERVICE

(No. 6773—*Board of Trustees, Firemen's Pension Fund—G. F. M.—September 24, 1930—2 pp.*)

A fireman who resigned and then withdrew his resignation is merely on the eligible list and cannot receive a disability pension. Only firemen in active service can receive disability pensions.

Citation:

Statute: Firemen's Pension Fund act (1917), sec. 9.

DUTY DISABILITY BENEFIT TO FIREMAN NOT IN ACTIVE SERVICE

(No. 7965—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—March 14, 1933—1 p.*)

A duty disability benefit may be paid only to a fireman in the active service of the Fire Department.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, sec. 46.

Opinion No. 7836 of December 14, 1932, to the Retirement Board, Firemen's Annuity and Benefit Fund is in accord with the above opinion.

QUALIFICATIONS FOR DUTY DISABILITY BENEFITS

(No. 7404—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—January 7, 1932—2 pp.*)

A duty disability benefit may be paid only to a person who is a member of the Fire Department, and the payments of the benefit can continue only during the period of time the person remains a member of the Fire Department and eligible to be "returned to active service in his proper rank or grade" upon recovery from his disability.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, sec. 46.

QUALIFICATIONS FOR DUTY DISABILITY BENEFITS

(No. 7943—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—February 15, 1933—2½ pp.*)

A fireman in active service who became incapacitated to perform any duty in the fire service to which he can be assigned as a result of a specific injury incurred in the performance of an act of duty as a fireman, is entitled to be paid a duty disability benefit under the Firemen's Annuity and Benefit Fund.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, secs. 12, 46, 52.

QUALIFICATIONS FOR DUTY DISABILITY BENEFITS

(No. 8878—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—September 23, 1935—2½ pp.*)

A fireman who responded to a fire alarm, swung around to the sliding pole, missed, and fell to the floor below was performing an act of duty and is entitled to a duty disability benefit.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, sec. 12.

RIGHTS IN FIRE DEPARTMENT WHILE RECEIVING DUTY DISABILITY BENEFIT

(No. 8764—*Chief Fire Marshal—G. F. M.—May 7, 1935—3½ pp.*)

A fireman receiving a duty disability benefit continues to be a member of the Fire Department up to the age of fifty-seven years, or if he is receiving some other disability benefit he continues to be a member of the Fire Department for one-half of his period of service.

The city should assume full liability for medical and hospital bills of a fireman injured in the performance of his duties so long as he remains a member of the Fire Department and continues so disabled, or until such a time as the City Council no longer makes an appropriation for those expenses.

Citations:

Statute: SH '33, 24: 869(a).

Ordinance: Coun. J. (1930-31), p. 3573.

RIGHTS TO ORDINARY DISABILITY BENEFIT OR DISABILITY PENSION

(No. 7682—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—August 2, 1932—1½ pp.*)

An ordinary disability benefit can be awarded under the Firemen's Annuity and Benefit Fund act only to a fireman who became disabled as a result of any cause other than the performance of an act or acts of duty and other than as a result of alcoholism or venereal infections.

The right of a fireman to a disability pension, under the Firemen's Pension act, when such fireman, while in active service or on leave of absence, becomes physically or mentally disabled so as to render retirement from active service necessary, is preserved to a fireman who was a member of the Fire Department on July 1, 1931.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, sec. 52.

QUALIFICATIONS FOR ORDINARY DISABILITY BENEFITS

(No. 7647—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—July 13, 1932—1½ pp.*)

Suspension under charges does not constitute discharge from the service and as long as a fireman remains a member of the Fire Department, he is entitled to the benefits and chargeable with the obligations provided for in the Firemen's Annuity and Benefit Fund act.

Any fireman in the service who becomes disabled as result of any cause other than the performance of an act or acts of duty and other than as a result of alcoholism or venereal disease is entitled to ordinary disability benefits from the Firemen's Annuity and Benefit Fund.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, sec. 47.

AMOUNT OF AND QUALIFICATION FOR ORDINARY DISABILITY BENEFITS

(No. 7688—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—August 3, 1932—2 pp.*)

As an ordinary disability benefit is based on the employees' salary at the date the disability occurred, subsequent salary reductions do not affect the amount of this disability benefit.

The ordinary disability benefit is an amount equal to one-half the

salary of the disabled fireman as such salary was on the date such disability occurred.

"Disability" under the Firemen's Annuity and Benefit Fund act is defined as a condition of physical or mental incapacity to perform the duty or duties in the Fire Department to which such fireman can be or shall be assigned.

A fireman, fifty years of age, who has completed over twenty years of service, may retire on an annuity equal to one-half of his salary as such salary was on the day one year prior to the date of his resignation from the service.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, secs. 12, 47, 52, 56.

Opinion No. 7775 of October 13, 1932, to the Retirement Board, Firemen's Annuity and Benefit Fund is in accord with the above opinion.

DATE ORDINARY DISABILITY BENEFITS COMMENCE

(No. 7687—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—August 3, 1932—1½ pp.*)

Ordinary disability benefit computation should start from the day on which the disability occurred provided that no salary had been received by such disabled fireman after that day; however, if any salary had been paid subsequent to the date of the disability such disability shall be considered to have started on the day following the last day for which he was entitled to and received said salary.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, sec. 47.

SALARY BASIS OF DISABILITY BENEFITS

(No. 8121—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—July 18, 1933—2 pp.*)

Disability benefits and pensions must be based on the annual salary of the fireman concerned at the time the award is made, as set out in the current appropriation bill, which in 1933 was the compensation computed for the year less a deduction for a specified number of days.

Citations:

Statute: Firemen's Annuity and Benefit Fund act, sec. 57½.

Ordinance: Annual Appropriation ord., 1933, sec. 8.

FAILURE OF DISABLED FIREMAN TO APPLY FOR BENEFITS

(No. 7685—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—August 3, 1932—2 pp.*)

A fireman over fifty years old with over twenty years service, who has not applied for ordinary disability benefits nor resigned from the service, cannot be awarded an ordinary disability benefit or an annuity, but he may be awarded a disability pension under the Firemen's Pension act of 1917 if he was a member of the Fire Department on July 1, 1931.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, secs. 12, 47, 51-52, 56.

TERMINATION OF DISABILITY PENSION

(No. 8733—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—March 27, 1935—3 pp.*)

A disability pension being paid to a fireman under a former pension act should be discontinued as soon as the Retirement Board of the Firemen's Annuity and Benefit Fund is satisfied that the fireman has recovered from his disability, and such fireman should immediately report for reassignment to duty.

The age of a fireman who has been retired on a disability pension has no effect whatever on the power of the Retirement Board of the Firemen's Annuity and Benefit Fund to require the fireman to submit to a physical or mental examination.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, sec. 52.

RIGHTS OF DISABLED FIREMAN WITH TWENTY YEARS' SERVICE UNDER FIFTY YEARS OF AGE

(No. 7683—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—August 2, 1932—2½ pp.*)

A fireman who has served over twenty years in the Fire Department and is under the age of fifty and is incapacitated for active service may accept ordinary disability benefit payments less deductions for annuity purposes until the age of fifty when he could resign from the department and become entitled to an annuity.

Citations:

Statutes: Firemen's Annuity and Benefit Fund act, secs. 12, 47, 52, 56.
Firemen's Pension act (1917), sec. 9.

COMPUTATION OF ORDINARY DISABILITY BENEFITS

(No. 7686—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—August 3, 1932—2 pp.*)

A fireman who takes his disability pension under section 52 of the Firemen's Annuity and Benefit Fund act would have it computed on his salary at the date of disability but he would not be subject to deductions for annuity purposes; also by filing his resignation under section 52 and taking such disability pension, he will be entitled, upon attaining the age of fifty, and on entering the service, to an annuity if he has completed more than twenty years of service in the department.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, secs. 47, 52.

ORDINARY DISABILITY BENEFITS UNDER SECTIONS FORTY-SEVEN AND FIFTY-TWO OF ANNUITY ACT

(No. 7681—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—August 2, 1932—3½ pp.*)

The ordinary disability benefit of a fireman under section 47 of the Firemen's Annuity and Benefit Fund act should equal one-half of his salary at the time the disability occurred and not at the time of the disability award, subject to deductions for annuity purposes. He may then resign when he attains twenty years service and the age of fifty on a pension of one-half the salary of his rank or grade as such salary may be on the day one year prior to the date of his resignation.

A fireman having served more than twenty years who resigns and takes his liability pension under section 52 of the Firemen's Annuity and Benefit Fund act would receive a disability pension of one-half the salary attached to his rank in the service on the date of retirement.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, secs. 12, 47, 52.

(5) Specific Benefits—Widows, Children and Parents**DETERMINATION OF WIDOW'S ANNUITY RIGHTS**

(No. 7653—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—July 18, 1932—2 pp.*)

The annuity rights of a fireman's wife are determined by the law in effect at the time of his separation from the service whether such

retirement be for disability or because of age and service, unless otherwise provided by law.

Citations:

Statutes: Firemen's Annuity and Benefit Fund act, secs. 27-28, 32, 37, 52. Firemen's Pension Fund act (1917), secs. 9-10. Ill. Laws (1917), p. 260.

Case: People v. Chicago, 286 Ill. 105 (1919).

Opinion No. 6772 of September 24, 1930, to the Board of Trustees of the Firemen's Pension Fund deals with the same general subject as the above opinion.

Widow's Pension, Remarriage: A widow pensioner under the Firemen's Pension Fund act, who remarries but whose second marriage was annulled before the Firemen's Annuity and Benefit Fund act became operative is entitled to be restored to the pension roll as of the date of the annulment of her marriage, as section 58 of the new act prohibiting resumption of an annuity upon annulment of a widow's subsequent marriage applies only when the annulment took place after the new act was in force.—People v. Retirement Board, Firemen's Annuity and Benefit Fund, 272 Ill. App. 59 (1933).

RIGHTS TO WIDOW'S ANNUITY

(No. 7759—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—September 27, 1932—1 p.*)

A widow, who married a fireman while he was in active service and after he had reached the age of fifty-seven, and subsequent to July 1, 1931, has no rights to any annuity provided for in the Firemen's Annuity and Benefit Fund act.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, sec. 38.

Opinion No. 8767 of May 14, 1935, to the Retirement Board, Firemen's Annuity and Benefit Fund is in accord with the above opinion.

WIDOW'S PENSION WHEN MARRIAGE SUBSEQUENT TO FIREMAN'S RETIREMENT—DETERMINATION OF WIDOW'S PENSION

(No. 8367—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—April 18, 1934—1½ pp.*)

The right of a person to a pension is determined by the law in existence at the time such right accrues to such person.

A widow of a fireman receiving a pension under the Firemen's Pension Fund act of 1917 has the right to receive a pension in accordance with the provisions of that act.

No pension is payable to a widow of a deceased pensioned fireman

who married such fireman subsequent to his retirement on a pension under the Firemen's Pension Fund act of 1917.

Citations:

Statutes: Firemen's Annuity and Benefit Fund act, sec. 52.
Firemen's Pension act (1917), sec. 10.

Cases: Hughes v. Traeger, 264 Ill. 612 (1914).
Pecoy v. Chicago, 265 Ill. 78 (1915).

Opinion No. 8217 of November 16, 1933, to the Retirement Board of the Firemen's Annuity and Benefit Fund is in accord with the above opinion.

PRORATING OF WIDOW'S ANNUITY

(No. 8459—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—July 9, 1934—1½ pp.*)

Annuities cannot be prorated as to portions of a month.

An annuity of the widow of an active fireman cannot be prorated in the event of her death before the expiration of an annuity payment month, even though she receives the minimum annuity under the Firemen's Annuity Benefit Fund act.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, sec. 57.

PAYMENT OF DELINQUENT SALARY CONTRIBUTIONS BY FIREMAN'S WIDOW

(No. 8556—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—November 9, 1934—3 pp.*)

Money due for a service credit for which no contributions were made constitutes a conditional debt in that the service credit would be allowed only if it were paid for by salary deductions or otherwise, and these may be paid by a fireman's widow to obtain her full annuity benefits.

Citations:

Statute: Firemen's Annuity and Benefit Fund act, sec. 39(f).

Case: Colton v. Board of Trustees, 287 Ill. 56 (1919).

CONFLICTING CLAIMS FOR WIDOW'S ANNUITY

(No. 8566—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—November 19, 1934—3 pp.*)

Where two women claim a fireman's widow's annuity, it should be paid to the first wife in the absence of evidence of a divorce from the first wife before the second marriage; to protect the city in case

any records of such divorce do appear, a release should be obtained from the second wife or a bill of interpleader should be filed and the annuity paid into court.

Citations:

Statutes: Firemen's Annuity and Benefit Fund act, sec. 32, par. (g) 1.
Ill. Laws (1931), p. 263.

AMOUNT OF PRIOR SERVICE AND ORDINARY WIDOW'S ANNUITY

(No. 7299—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—November 16, 1931—2½ pp.*)

The widow of a fireman who had been in the service on and prior to June 30, 1931, and whose death resulted from causes incident to his work is entitled to a prior service annuity and to the ordinary widow's annuity under the Firemen's Annuity and Benefit Fund act, the total of these two to be not less than \$45.00 per month, unless it is proved that the death of her husband resulted from performance of an act of duty in which case she is entitled to a compensation annuity.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, secs. 12, 22, 24, 32, 33, 37, 57.

PENSIONS TO UNMARRIED MINOR CHILDREN

(No. 8088—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—June 8, 1933—2 pp.*)

Unmarried minors under eighteen years of age who are the children of a deceased retired fireman who received a pension under the act of 1917, and whose mother is not living, are entitled to receive a pension of \$15.00 per month until they marry, die or reach the age of eighteen.

Citation:

Statute: Ill. Laws (1931), p. 236 (Firemen's Annuity and Benefit Fund act).

CHILD'S ANNUITY WHEN FIREMAN DIED WHILE RECEIVING A DISABILITY PENSION

(No. 8172—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—September 12, 1933—2½ pp.*)

The minor child of a fireman who did not die from any acts of duty, nor while in the service, nor when over fifty years of age, nor after serving twenty years, but died while receiving a disability pension un-

der the Firemen's Pension Fund, is not entitled to a child's annuity under the Firemen's Annuity and Benefit Fund act, but only to the amounts provided in the Firemen's Pension Fund act.

Citations:

Statutes: Firemen's Pension Fund act (1917), secs. 9, 10.

Firemen's Annuity and Benefit Fund act, secs. 44, 52.

Opinion No. 8397 of May 18, 1934, to the Retirement Board of the Firemen's Annuity and Benefit Fund is in accord with the above opinion.

PRORATING OF CHILD'S ANNUITY

(No. 8444—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—June 27, 1934—1½ pp.*)

A "child's annuity" provided for in the Firemen's Annuity and Benefit Fund act cannot be prorated in the event the child dies before reaching the age of eighteen years because such annuity has an actuarial basis and is not in the nature of a pension.

Citations:

Statutes: Firemen's Annuity and Benefit Fund act, secs. 43, 44.

REQUIREMENTS FOR PARENT'S ANNUITY

(No. 8523—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—October 15, 1934—2 pp.*)

A parent's annuity cannot be awarded from the Firemen's Annuity and Benefit Fund unless satisfactory proof shall be made to the Retirement Board that the deceased fireman was contributing to the support of such parent a sum equal to \$25 a month regularly until and for a period of not less than three months prior to the date of his death.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, sec. 45.

REQUIREMENTS FOR PARENT'S ANNUITY

(No. 8145—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—August 16, 1933—1½ pp.*)

A parent's annuity from the Firemen's Annuity and Benefit Fund is not awarded as a matter of right but only where the deceased fireman had contributed at least \$25 a month for the support of his parent regularly for a period of not less than three months prior to the date of death. Where the parent receives \$133.33 per month for his own pension from the fund, he obviously requires no support from his children and cannot be awarded a parent's annuity.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, sec. 45.

REQUIREMENT FOR PARENTS' ANNUITY

(No. 7754—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—September 22, 1932—2½ pp.*)

A parents' annuity under the Firemen's Annuity and Benefit Fund can only be paid when the contributions made by a fireman to his parents were actually for the parents' support and not merely for greater comfort and happiness.

Citation:

Statute: Firemen's Annuity and Benefit Fund act, sec. 45.

DEPENDENT PARENT'S PENSION

(No. 7546—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—April 15, 1932—2 pp.*)

No dependent parent pension should be paid to the mother of a deceased fireman under the terms of the Firemen's Pension Fund act of 1917 where the records show that she was being supported by her husband at the time of her son's death and that the husband is still alive.

Citations:

Statutes: Firemen's Annuity and Benefit Fund act (1931), secs. 45, 52.
Firemen's Pension Fund act (1917), sec. 10(c).

REQUIREMENTS FOR PARENT'S PENSION

(No. 7861—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—December 27, 1932—2 pp.*)

The mother of a fireman who had been retired in accordance with the Pension Fund act of 1917 because of a physical disability and who died in 1932 is entitled, nevertheless, to a parent's pension of \$25 per month beginning with the date of the son's death, if he left no widow or minor child and if the mother was dependent upon him for support prior to and at the time of his death.

Citations:

Statutes: Ill. Laws (1931), p. 281 (Firemen's Annuity and Benefit Fund act, sec. 52).
Firemen's Pension Fund act (1917), secs. 9, 10.

F. OTHER FUNDS

MUNICIPAL COURT AND LAW DEPARTMENT EMPLOYEES' ANNUITY AND BENEFIT FUND, SERVICE CREDITS PRIOR TO JANUARY 1, 1936

(No. 8959—Retirement Board, Municipal Court and Law Department Employees' Annuity and Benefit Fund—G. F. M.—December 10, 1935—1½ pp.)

In computing the term of service rendered by any employee prior to January 1, 1936, for the purposes of the Municipal Court and Law Department Employees' Annuity and Benefit Fund, the entire period of time beginning on the date when such employee was first appointed to the service and ending on December 31, 1935, should be counted, excepting any intervening period during which any employee shall have been separated from the service by resignation or discharge.

Periods of leave of absence occurring prior to July 1, 1935, as well as from July 1, 1935, to January 1, 1936, should be counted as periods of service in computing the term of service rendered by any employee subject to the Municipal Court and Law Department Employees' Annuity and Benefit Fund.

Citation:

Statute: Municipal Court and Law Department Employees' Annuity and Benefit Fund act, secs. 6, 48.

COURT AND LAW DEPARTMENT FUND, RIGHTS ON LEAVE OF ABSENCE—DEDUCTIONS FOR FUND MANAGEMENT

(No. 8960—Retirement Board, Municipal Court and Law Department Employees' Annuity and Benefit Fund—G. F. M.—December 10, 1935—2 pp.)

Persons entitled to participate in the Municipal Court and Law Department Employees' Annuity and Benefit Fund who are on leave of absence should be carried on the Retirement Board's records as participants with the notation "on leave of absence," when such persons have been granted such leave.

A deduction of one-half of one per cent of the salary of each employee subject to the Municipal Court and Law Department Employees' Annuity and Benefit Fund act should be deducted for the period from July 1, 1935, to January 1, 1936, to defray the costs of administration of the fund.

Citation:

Statute: Municipal Court and Law Department Employees' Annuity and Benefit Fund act, secs. 6, 13.

**HOUSE OF CORRECTION EMPLOYEES' PENSION FUND,
TRANSFER FROM MUNICIPAL EMPLOYEES' FUND**

(No. 8313—*President, House of Correction Employees' Pension Fund—G. F. M.—February 21, 1934—1 p.*)

No provision in the acts which created the Municipal Employees' Annuity and Benefit Fund and the House of Correction Pension Fund authorizes a transfer of an employee from the Municipal Employees' Annuity and Benefit fund to the House of Correction fund.

**HOUSE OF CORRECTION EMPLOYEES' PENSION FUND,
PARTICIPATION RIGHTS**

(No. 8291—*President, House of Correction Employees' Pension Fund—G. F. M.—February 1, 1934—1½ pp.*)

No employee of the House of Correction can contribute to its Pension Fund if he is over fifty years of age, unless he has served ten years as an employee in the House of Correction. City employees involuntarily transferred to the House of Correction constitute special cases and separate opinions must be rendered in such cases concerning their rights.

Citation:

Statute: SH '33, 67: 18-31.

**HOUSE OF CORRECTION EMPLOYEES' PENSION FUND,
CONTRIBUTIONS FROM MOTOR VEHICLE FINES**

(No. 7207—*City Comptroller—S. A. M.—October 22, 1931—2 pp.*)

No portion of the funds for violations of the "State Motor Vehicle Law" which are collected at the House of Correction are subject to the three per cent deduction payable to the House of Correction Employees' Pension Fund.

Citation:

Statute: SH '31, 67: 18.

**HOUSE OF CORRECTION EMPLOYEES' PENSION FUND,
MONEY DUE FROM CITY**

(No. 8307—*President, House of Correction Employees' Pension Fund—G. F. M.—February 19, 1934—1½ pp.*)

While the pension fund of the House of Correction, in the matter of monies due from the city on warrants paid and fines collected, is not a creditor of the city in the general acceptance of the word "cred-

itor," it is entitled to receive these monies immediately after they have been collected by the Comptroller or Treasurer of the city.

Citation:

Statute: House of Correction Pension Fund act, sec. 1.

**LABORERS' AND RETIREMENT BOARD EMPLOYEES' ANNUITY AND BENEFIT FUND, REFUND OF DEDUCTIONS
MADE IN ERROR**

(No. 8900—*Retirement Board, Laborers' and Retirement Board Employees' Annuity and Benefit Fund*—G. F. M.—October 22, 1935—2 pp.)

A person working as a civil service laborer under a certification other than his own should have all wage deductions made for participation in the Laborers' and Retirement Board Employees' Annuity and Benefit Fund returned to him as deductions made in error, since he is not entitled to the position he holds in the service and is perpetrating a fraud on the city.

Citation:

Statute: Laborers' and Retirement Board Employees' Annuity and Benefit Fund act, sec. 12.

**LABORERS' AND RETIREMENT BOARD EMPLOYEES' FUND,
RIGHTS TO WIDOW'S PRIOR SERVICE ANNUITY**

(No. 8961—*Retirement Board, Laborers and Retirement Board Employees' Annuity and Benefit Fund*—G. F. M.—December 10, 1935—1½ pp.)

The widow of an employee who entered the service after he attained the age of sixty-five is not entitled to a "prior service annuity" under the terms of the Laborers' and Retirement Board Employees' Annuity and Benefit Fund.

Citation:

Statute: Laborers' and Retirement Board Employees' Annuity and Benefit Fund act, secs. 23, 24.

G. POLICEMEN'S AND FIREMEN'S DEATH BENEFIT FUND

NATURE OF TRUST FUND AWARD

(No. 7636—*Chairman, Committee on Finance—G. F. M.—July 5, 1932*
—1½ pp.)

A trust fund award to the dependents of a deceased policeman or fireman is a gratuity which the City Council can change or abolish before an award is made; and as no dependent has any right to it until the award is made, no award which might have been made to a person can be made if such person dies prior to the making of any award.

Citations:

Ordinance: Code '31: 573, 574.

Cases: *Buetel v. Foreman*, 288 Ill. 106 (1919).

Hughes v. Traeger, 264 Ill. 612 (1914).

OPINION OF FOREGOING SYNOPSIS

Replying to your request as to the proper award to be made in the matter of the dependents of Patrolman James Caplis, the following is submitted:

Your letter states that Patrolman James Caplis died of a gunshot wound on December 21, 1931; that he left him surviving a partially dependent father and mother; that had the award been made to the dependent parents under the ordinance and paid to the trust officer at once said award would have amounted to \$3,000.00; that in the meanwhile the mother of Patrolman Caplis has died; and that the question now is on the amount of the award to be made at this time.

The right to an award under the ordinance creating the policemen's and firemen's death benefit fund, is not a vested right. The fifth section of the ordinance (Busch-Hornstein's Rev. Chicago Code, 1931, section 573, page 144) provides that no payment shall be made unless satisfactory proof shall have been presented to the board of trustees of the fund that the death occurred within one year from the date of the injury and from violence or other accidental cause. The granting of the award, therefore, lies within the sound discretion of the board of trustees, subject to the presentation of the proofs required by the ordinance. Other provisions of the ordinance designate how the money shall be dealt with.

The award is a gratuity analogous to a pension, which the City Council can change or abolish at any time before the award is made. (*Beutel v. Foreman*, 288 Ill. 106; *Hughes v. Traeger*, 264 Ill. 612.) Being in the nature of a gratuity, no one has any right in or to any award until the award is made. It therefore follows that an award must be made upon and in accordance with conditions which exist at the time of the award. In the instant case no award can now be made for the mother of Patrolman Caplis because she is now dead.

I am of the opinion that the only award which is permissible under the ordinance is an award to the father of Patrolman Caplis in the amount of \$2,000.00 as provided in paragraph F of the sixth section of the ordinance

in question. Busch-Hornstein's Rev. Chicago Code, 1931, paragraph 574, page 145.

* * * * *

IMPORTANT NOTE OF AMENDMENT

Substantial changes have been made in the provisions of the Policemen's and Firemen's Death Benefit Fund by an ordinance passed September 9, 1936.—Coun. J. (1936-37), p. 2283.

HANDLING OF TRUST FUND

(No. 8679—*M. H. F.*—February 21, 1935—2 pp.)

The city has performed its full duty when it has properly placed a trust fund in the hands of a duly qualified trustee. Thereafter, the execution of the trust is a matter between the trustee and the beneficiaries.

FINAL PAYMENT OF AWARD BY TRUSTEE BANK

(No. 8634—*City Comptroller—M. H. F.*—January 19, 1935—2 pp.)

In terminating the Policemen's and Firemen's Death Benefit Fund award of a deceased employee by payment of the monies in the fund to the beneficiary by the trustee bank through its receiver, the trustee bank should take a receipt and a release from the beneficiary. He should also report to the Comptroller that he has paid over the entire award, submitting a copy of the final settlement of the account. The city is not called upon to execute an additional receipt and release.

Citation:

Ordinance: Code '22: 3127-32.

REQUIREMENTS IN REPORTING DEATH

(No. 8259—*Fire Commissioner—G. F. M.*—January 3, 1934—2 pp.)

The Fire Commissioner's report to the Board of Trustees of the Policemen's and Firemen's Death Benefit Fund, in the case of the death of a fireman where it is not clearly established that the death was caused by an injury received in the performance of duty, should not contain any recommendation or expression of opinion as to whether there was an injury or as to whether death resulted from it, but rather, it should be a report containing the facts derived from a complete investigation with the statements of witnesses and a statement as to whether any third party was responsible for the injury.

Citation:

Ordinance: Code '31: 568-575.

DEATH BENEFIT FUND AWARDS WHEN SUIT BROUGHT AGAINST CITY

(No. 6571—*Chairman, Committee on Finance—J. W. B.—December 26, 1929—4½ pp.*)

The Board of Trustees of the Policemen's and Firemen's Death Benefit Fund has no power to stop the payment of awards made by it to the family survivors of a fireman killed on duty, pending the outcome of a suit brought by survivors against the city for causing the death of the fireman. The Board of Trustees of the Policemen's and Firemen's Life Insurance and Death Benefit Fund has no power to require future beneficiaries to waive any action they may have against the city, arising out of the death of a policeman or fireman. However the City Council may amend the ordinance so as to give the board that power and also to provide that the granting of an award under the ordinance would bar action against the city for the death of a policeman or fireman.

Citation:

Ordinance: Code '32: 3129, as amended.

MEANING OF INJURY IN "PERFORMANCE OF DUTY"

(No. 8228—*Chairman, Committee on Finance—G. F. M.—November 24, 1933—1½ pp.*)

Any fatal injury occurring to a policeman during the course of, or because of the performance of his duties, in the absence of any definition as to what shall constitute "performance of duties," entitles his family or dependents to a death benefit.

Citation:

Case: *People v. Retirement Board of Policemen's Annuity and Benefit Fund*, 326 Ill. 579 (1928).

AWARD WHEN DECEASED CONTRIBUTORILY NEGLIGENT

(No. 7380—*Chairman, Committee on Finance—G. F. M.—December 14, 1931—2½ pp.*)

The city is required to make an award, under the provisions of the ordinance on death benefits, to the dependents of a policeman who was killed or fatally injured while in the performance of his duties, even though the policeman was not free from contributory negligence on this own part.

Citations:

Statute: SH '31, 24: 867.

Ordinance: Code '31: 3127-32(a).

Case: *People v. Retirement Board of Policemen's Annuity and Benefit Fund*, 326 Ill. 579 (1928).

DEATH IN PERFORMANCE OF DUTY

(No. 8064—*Chairman, Committee on Finance—G. F. M.—May 16, 1933*
—2½ pp.)

State law and city ordinance limit the payment of allowances of money to the family or dependents of a policeman to those cases where the policeman died or was fatally injured while "in the performance of his duties" as a policeman.

A policeman killed by an automobile on his way home from attendance at a convention of the Policemen's Benevolent Association was not killed while "in the performance of his duties" as a policeman.

Citations:

Statute: SH '31, 24: 867-869(a).

Ordinance: Code '31: 568-575.

DEATH IN PERFORMANCE OF DUTY

(No. 7568—*Chairman, Committee on Finance—C. J. A.—May 5, 1932*
—1 p.)

The ordinance providing for an award to the family or dependents of a policeman, who was killed or fatally injured while performing his duties contemplates only those cases in which death or the injury was the consequence of the performance of some specific act or acts of duty.

Opinion No. 7571 of May 10, 1932, to the City Comptroller is in accord with the above opinion.

DISPOSAL OF AWARD UPON DEATH OF BENEFICIARY

(No. 7664—*Chairman, Committee on Finance—G. F. M.—July 26, 1932—2½ pp.*)

Where a trust fund award to a beneficiary of the Policemen's and Firemen's Death Benefit Fund is not turned over to the trustee prior to the death of the beneficiary, the entire amount awarded must revert to the city and be credited to the general corporate fund as the trust terminates upon such death.

Citations:

Ordinance: Code '31: 574(e).

Other reference: Opinion No. 7635 (this volume, p. 349).

DISPOSAL OF AWARD UPON DEATH OF BENEFICIARY

(No. 7635—*Chairman, Committee on Finance—G. F. M.—July 5, 1932*
—1½ pp.)

Where the sole beneficiary of a trust fund established according to an ordinance for the dependent of a deceased fireman or policeman dies, the unexpended portion of said trust fund must revert to the corporate fund of the city as specified in the ordinance and cannot be expended for burial or other expense of deceased beneficiary.

Citation:

Ordinance: Code '31: 574(e).

PAYMENT OF AWARD UPON REMARRIAGE OF WIDOW

(No. 8175—*Committee on Finance—J. F. G.—September 14, 1933—*
3 pp.)

A trust fund set up before June 28, 1933, for a widow or dependents of a policeman or fireman killed or fatally injured while in the performance of his duties is not terminated by the remarriage of the widow or beneficiary.

But as to such trust set up after June 28, 1933, the marriage of a beneficiary terminates that part of the trust allocated to him or her, and the proportionate part of the principal of the trust should be returned to the city and credited to the general corporate fund.

Citation:

Ordinance: Code '31: 574, sub-pars. 30, 32 (as amended, Coun. J., 1933-34, p. 616).

Opinions No. 7445 of February 9, 1932, and No. 7659 of July 22, 1932, both to the Chairman, Committee on Finance are in accord with the above opinion.

AWARD TO KIN WHEN WIDOW OR CHILD SURVIVE

(No. 7050—*Chairman, Committee on Finance—G. F. M.—August 3, 1931—2 pp.*)

There is no law or ordinance which permits the payment of any award to the father or mother or other next of kin of a deceased Chicago policeman when such deceased policeman left a widow or child surviving him.

Citations:

Ordinance: Coun. J. (1925-26), p. 2152.

Statute: Cah. '29, 24: 665.

AWARDS TO CHILDREN

(No. 8146—*Committee on Finance—G. F. M.—August 16, 1933—1½ pp.*)

The only children of a deceased fireman or policeman entitled to an award from the Policemen's and Firemen's Death Benefit Fund are the minor children, and, under some circumstances, a female unmarried child of full age or a male child physically or mentally disabled in case he or she was dependent upon the deceased for support at the time of his death.

Citation:

Ordinance: Code '31: 574 (as amended Coun. J., June 28, 1933).

**AWARD TO FATHER AND SISTER—DEATH OF A
CO-BENEFICIARY**

(No. 6787—*Commissioner of Police—C. J. A.—October 7, 1930—9 pp.*)

When a patrolman killed in the performance of his duties is survived by only his dependent father and dependent sister, the father and sister share equally in the award made by the trustees of the Policemen's and Firemen's Death Benefit Fund, and if the dependent father dies before receiving any part of the award, the full award should be paid to the dependent sister.

Citations:

Statute: SH '29, 24: 867.

Ordinance: Code '22: 3132 (as amended 1926).

Cases: O'Rear v. Krum, 135 Ill. 294 (1890-91).

Clark v. Patterson, 214 Ill. 533 (1905).

Pinkham v. Blair, 57 N. H. 226 (1876).

Chicago and Alton R. R. v. Shannon, 43 Ill. 345 (1866-67).

**AWARD TO WIDOW AND CHILDREN WHEN EX-WIFE
ALSO SURVIVES**

(No. 6833—*G. F. M.—February 10, 1931—2 pp.*)

Where a policeman is survived by a widow, an ex-wife and two minor children, the \$10,000 award under the Policemen's and Firemen's Death Benefit Fund should be credited in equal parts to the widow and to the two children, and in the event of the death of any one of them, that one's share should go, in equal parts, to the surviving beneficiaries.

Citation:

Ordinance: Code '22: 3132.

SECTION III

POLICE POWERS

CHAPTER VI.

GENERAL POLICE, HEALTH, SAFETY AND PUBLIC WELFARE REGULATIONS

INTRODUCTORY

When Chicago was incorporated as a town in 1833, the only police powers delegated by the state were those for the prevention and removal of nuisances, the restraining or prohibiting of gambling or other disorderly conduct, the prevention of the running and improper exhibition of horses and the protection of the city from injuries by fire. No health powers were given; in fact, it took a severe cholera epidemic to bring about the delegation in 1835 of the authority to enact health regulations. The general police powers of the city have grown since then and today occupy a substantial portion of the statutes of Illinois.

If we turn to the municipal code and compare the ordinances of the 1931 Code with the ordinances of the 1881 Code, the growth of municipal regulations is forcefully illustrated. In the 1931 Code the subject of building regulation occupies 226 pages, which is equivalent to almost 75 per cent of the 307 pages of the entire code of 1881. The subject of health regulations occupied twenty-one and one-half pages in the 1881 Code and covers 80 pages of the 1931 Code. In 1881 eight pages were devoted to fire regulation but in 1931, 156 pages deal with that subject.

Likewise the nature of police problems has undergone considerable alteration. Rapid technological change has transformed our entire way of living and brought with it changing needs for health, safety and welfare. Electricity alone has produced a variety of new subjects of regulation, such as the radio, measuring devices, refrigeration and other electrical conveniences. In the realm of biology, chemistry, metallurgy, physics and social institutions, innovations have also occurred in great number and with significant impact upon urban society.

Moreover, a change has appeared not only in the subjects, but also in the techniques and objectives of regulation. Today the police radio has completely overturned old methods of patrolling the city. New vaccines have been discovered for disease prevention. Modern fire fighters are equipped with new instruments which multiply their effectiveness in checking and preventing the spread of fires.

As for the objectives of regulation, the focus of attention has been moving from regulation to prevention. Thus, the health department is today concerned with preventing as well as eliminating disease, and the fire department is concerned with regulations designed to prevent the inception of fires.

This chapter covers generally a wide range of police, fire, health and safety regulations, whereas the other chapters in this section on police powers deal with more specific phases of police regulation. The questions raised herein are concerned with such various subjects as ambulance-chasing, birth control, burials, explosives, fire alarm systems, marathon dances, massage parlors, picketing, prostitution, obscene literature and vaccination.

Special emphasis is given to methods of police enforcement, inspection and permits, building regulation, gambling, liquor regulation and the regulation of weights and measures. The opinions in this chapter vividly portray the wide range of police powers, the limitations in the exercise of those powers and their large number and variety.

A. ENFORCEMENT OF POLICE REGULATIONS*

ARREST WITHOUT WARRANT—SEARCH AND SEIZURE

(No. 7152—*Mayor—C. J. A. and J. F. G.—September 28, 1931—19 pp.*)

After an officer has lawfully arrested a person regardless of whether with or without a warrant for arrest, he may, as an incident to the arrest, search the person and the premises upon which the arrest took place for evidence of the crime without a search warrant, although he may not search any other premises without a search warrant. Such a search does not constitute an unreasonable search or seizure in the constitutional sense, and the articles thus taken, if they otherwise have a proper bearing upon the crime, are admissible in evidence.

An officer may arrest a person without a warrant for a crime committed or attempted in his presence and in cases where a criminal offense, felony or misdemeanor has actually been committed and the officer has reasonable ground for believing that the person to be arrested has committed it. In making such arrest the officer may use whatever force is reasonably necessary.

Citations:

Constitution: United States, Fourth amendment.
Illinois, art. II, sec. 6.

Statute: SH '29, 38: 352, 585, 586, 657 (Criminal code).

Cases: *People v. Reid*, 315 Ill. 597 (1925).
People v. McGurn, 341 Ill. 632 (1931).
Gindrat v. People, 138 Ill. 103 (1891).
People v. Paisley, 288 Ill. 310 (1919).
Boyd v. United States, 116 U. S. 616 (1885).
Adams v. New York, 192 U. S. 585 (1903).
Holt v. United States, 218 U. S. 245 (1909-10).
Silverthorn Lumber Co. v. United States, 251 U. S. 385 (1919-20).
Carroll v. United States, 267 U. S. 132 (1924).
Agnello v. United States, 269 U. S. 20 (1925).
People v. Swift, 319 Ill. 359 (1926).
People v. DeLuca, 343 Ill. 269 (1931).
McBride v. United States, 284 Fed. 416, 419 (1922-23).
People v. Scalisi, 324 Ill. 131, 146 (1927).
Shanley v. Wells, 71 Ill. 78 (1873-74).

Other references: 4 Blackstone's Commentaries, 292.
5 CJ 34, 424, 426.

OPINION OF FOREGOING SYNOPSIS

In compliance with your request, we beg to submit the following opinion relative to the authority of the police to arrest without a warrant persons

*See opinions, p. 29, on cooperation with adjoining municipalities in police regulation, opinions, p. 35, on police regulation in the Chicago Park District, Opinion No. 7371, p. 33, on police jurisdiction over dead bodies, and Opinion No. 7027, p. 424, on reward for the capture of criminals.

guilty of violating the gambling laws, and in connection with such arrests, to seize property used as gambling devices.

The question of search and seizure without warrant, and the question of arrest without a warrant, have sometimes been confused, but though they are closely related, they are quite distinct in law. A search and seizure in the strict sense is in effect an *investigation* for the purpose of determining whether an arrest shall be made, or for the purpose of procuring evidence for use at the trial. An independent search of that character can only be made under authority of a warrant duly issued. On the other hand, an incidental search of the person of a prisoner after he has been arrested, or of the house in which he was arrested, is not regarded by the courts as a search and seizure in the constitutional sense such as would require an antecedent search warrant.

Section 6 of article 2 of the Constitution of Illinois provides:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without proper cause, supported by affidavit, properly describing the place to be searched and the persons or things to be seized."

This section is almost identical in language with the fourth amendment to the Constitution of the United States, which was applied by our Supreme Court in the case of *People v. Brocamp*, 307 Ill. 448, and *People v. Castree*, 311 Ill. 391. In each of these cases the Supreme Court held that the search and seizure, being without a proper warrant, was illegal, and that the articles so unlawfully seized could not be used as evidence, but must be returned.

It might be stated that the decisions of our state Supreme Court in the two cases last mentioned which have been followed in subsequent cases (*People v. Reid*, 315 Ill. 597; *People v. Stokes*, 334 Ill. 200; *People v. McGurn*, 341 Ill. 632) constituted a distinct departure from prior decisions of the court, for up to that time the court had always held that evidence otherwise competent could be introduced, regardless of how it has been obtained. *Gindrat v. People*, 138 Ill. 103; *Sievert v. People*, 143 Ill. 571; *Trask v. People*, 151 Ill. 523; *People v. Paisley*, 288 Ill. 310.

The decisions of our Supreme Court in the *Brocamp* and *Castree* cases were evidently made to bring the law of this state in conformity with the law as interpreted on the same subject by the Supreme Court of the United States. It is proper, therefore, to consider what the latter court has held relative to this question.

The case of *Boyd v. United States*, 116 U. S. 616, was an information filed by the United States District Attorney against E. A. Boyd & Sons in a case of seizure and forfeiture of property for violation of the customs revenue laws. * * *

* * * * *

In the case of *Adams v. New York*, 192 U. S. 585, the court adopted a liberal view and held that certain papers or policy slips, lottery tickets, etc., were admissible in evidence regardless of how they have been obtained. The *Adams* case was followed in *Hale v. Henkel*, 201 U. S. 43, and *Holt v. United States*, 218 U. S. 245.

In the case of *Weeks v. United States*, 232 Ill. 383, the court again reverted to the strict rule and held that where private papers, books and other property have been unlawfully seized, and the defendant makes a motion before the trial to have the same returned to him, such motion should be granted. * * *

* * * * *

In the case of *Silverthorn Lumber Company v. United States*, 251 U. S. 385, a representative of the Department of Justice had made a raid of the

office of the defendant and taken certain books, papers and documents to be used in evidence against the defendant. * * *

In the case of *Gouled v. United States*, 255 U. S. 298, the court held that papers obtained from the defendant fraudulently were subject to the same rule as papers obtained by forcible seizure and could not, therefore, be used as evidence.

In the case of *Amos v. United States*, 255 U. S. 313, two deputy collectors of Internal Revenue had gone to the home of the defendant in his absence, searched his home, and found a small quantity of illicitly distilled whiskey. * * *

It will be noted in all of these cases there was involved the question of search and seizure in the strict constitutional sense. In all of these cases the officers had unlawfully entered the premises of the defendants, and there was no discussion by the courts as to what powers the officers would have had if their entry upon the premises of the defendants had been lawful.

It is a settled rule of law, however, that after an officer has lawfully arrested a person, he has the right to make a reasonable search of the person of the prisoner and of the premises where the arrest took place, and this rule applies equally whether the arrest was with or without a warrant so long as the arrest was lawful.

In *Carroll v. United States*, 267 U. S. 132, the Supreme Court of the United States said (page 158):

"When a man is legally arrested for an offense, whatever is found upon his person or in his control, which it is unlawful for him to have, and which may be used to prove the offense, may be seized and held as evidence in the prosecution. *Weeks v. United States*, 232 U. S. 383, 392, L. R. A. 1915 B. 834; *Dillon v. O'Brien*, 16 Cox C. C. 245, 20 L. R. Ir. 300, 7 Am. Crim. Rep. 66; *Getchell v. Page*, 103 Me. 387, 18 L. R. A. (N. S.) 253; *Kneeland v. Connelly*, 70 Ga. 424; 1 Bishop Crim. Proc. Sec. 211; 1 Wharton Crim. Proc. (10th Ed.), Sec. 97."

In the case of *Agnello v. United States*, 269 U. S. 20, certain government detectives had arrested the defendants, Agnello and Alba, in a house owned by the latter for unlawfully selling narcotics. * * * The court held that the search of the house of Alba was lawful after the arrest had been lawfully made, because it was the premises on which the arrest was made and that therefore the search of the same was merely incidental to the arrest. On the other hand, however, the court held that the search of the house of Agnello, without a search warrant, was unlawful, because it was a different place from that where the arrest was made, and consequently, the search thereof could not be said to be incidental to the arrest. * * *

In *Weeks v. United States*, 232 U. S. 383, where the defendant, prior to the trial, filed a petition for the return of certain letters and documents which had been taken from his room in his absence by government officials without a search warrant, the court said (page 392):

"It is not an assertion of the right on the part of the Government *always recognized under English and American law to search the person of the accused when lawfully arrested* to discover and seize the fruits and evidences of crime. This right has been uniformly maintained in many cases. * * *

In *People v. Swift*, 319 Ill. 359, where the defendant had been arrested without a warrant in a private residence on suspicion of being implicated in a bank robbery, the court said (page 363):

"* * * It is the rule in this state and generally that where an arrest is made by an officer who has reasonable ground for believing that the person arrested is implicated in a crime, such officer has a right to arrest

without a warrant and to search the person arrested without a search warrant. * * *

In *People v. Hord*, 329 Ill. 117, the court said, at page 119:

"* * * The guaranty of the constitution is not against all search and seizure but against unreasonable search and seizure, and does not extend to immunity from search on arrest." * * *

* * *
In the case of *Dillon v. O'Brien*, 16 Cox Crim. Cas. 245, in laying down the rule that an officer after having lawfully arrested a person, may, without a search warrant, search his person as well as the premises where the arrest occurred, the court said (page 250):

"But the interest of the state in the person charged being brought to trial in due course necessarily extends, as well to the preservation of material evidence of his guilt or innocence, as to his custody for the purpose of trial. His custody is of no value if the law is powerless to prevent the abstraction or destruction of this evidence, without which a trial would be no more than an empty form. But if there be a right to production or preservation of this evidence, I cannot see how it can be enforced otherwise than by capture."

Other cases to the same effect are:

Spalding v. Preston, 21 Vt. 9.

Smith v. Jerome, 47 Misc. 22.

Clossom v. Morrison, 47 N. H. 482.

Houghton v. Bachman, 47 Barb. 388.

State v. Mausert, 88 N. J. L. 386.

State v. Robbins, 8 L. R. A. 438.

Accordingly, we are of the opinion that after an officer has lawfully arrested a person for a crime, he may as incident thereto, without a search warrant, search his person and the premises upon which the arrest took place for evidence of the crime, although he may not search any other premises without a search warrant; that such search does not constitute an unreasonable search or seizure in a constitutional sense, and that articles thus taken if they otherwise have a proper bearing upon the crime, are admissible in evidence, and this rule applies equally whether the arrest has been with or without a warrant for arrest, provided it has been a lawful arrest.

We come then to the question when an officer may lawfully arrest without a warrant. At common law a peace officer had the power to arrest for a *felony* without a warrant, provided the felony had actually been committed and he had reasonable grounds for suspecting that the person to be arrested had committed the felony. This right to arrest without a warrant did not, however, extend to a misdemeanor unless the same man committed it in the presence of the officer. * * *

* * *
Section 4 of Division VI of the Criminal Code of this state (*Smith-Hurd's Stat.* 1929, chap. 38, par. 657), reads as follows:

"Arrests without warrant. Sec. 4. An arrest may be made by an officer or by a private person without warrant, for a criminal offense committed or attempted in his presence, and by an officer, when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it."

In construing this statute, our courts, in the earlier decisions, were inclined to the common law rule and held that the right of an officer to arrest without a warrant was limited to *felonies* and did not extend to mere misdemeanors, unless committed in the presence of the officer. * * *

* * *

The Criminal Code of this state defines a felony as "an offense punishable with death or by imprisonment in the penitentiary," and declares that "every other offense is a misdemeanor" (Crim. Code, Div. II, Secs. 5, 6; Smith-Hurd's Stat. 1929, chap. 38, pars. 585 and 586). Under this definition the keeping of a gambling house is as to the first and second offense a misdemeanor, but as to the third or any subsequent offense (being punishable by imprisonment in the penitentiary) it constitutes a felony (Smith-Hurd's Stat. 1929, chap. 38, par. 325).

Recently, however, the Supreme Court of this state has given a very broad interpretation to the statute above quoted, so that now it may be said to be the law in this state that a police officer has the same power to arrest without a warrant in the case of a misdemeanor as in the case of a felony.

* * * * *

It will be noted that our statute makes it a prerequisite to an arrest without a warrant that a criminal offense has in fact been committed. It does not say that the officer must know that the offense has been committed. But if he undertakes to arrest upon mere suspicion without actual knowledge, he assumes the risk of becoming liable for false arrest in case it should transpire that no criminal offense had in fact been committed.

As to the amount of force that an officer may use in making an arrest, the general rule is that he may use whatever force is reasonably necessary, and there seems to be no difference in that regard whether the arrest is made with or without a warrant. Blackstone says that a constable in arresting a felon without a warrant,

"is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon, if he cannot otherwise be taken." 4 B. Com. 292; Shanley v. Wells, 71 Ill. 78. * * *

* * * * *

Relative to the question when an officer has reasonable cause to believe that the person about to be arrested has committed a criminal offense, Mr. Chief Justice Taft said in the case of *Carroll v. United States*, 267 U. S. 132 (page 161):

"The necessity for probable cause in justifying seizures on land or sea, in making arrests without warrant for past felonies, and in malicious prosecution and false imprisonment cases, has led to frequent definition of the phrase. In *Stacey v. Emery*, 97 U. S. 642, 645, a suit for damages for seizure by a collector, this court defined probable cause as follows:

"If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient." * * *

* * * * *

From the foregoing authorities it must be concluded that when the Constitution speaks of "unreasonable searches and seizures," the words "searches" and "seizures" are used in a restricted sense and not in such a broad sense so as to include incidental search of a prisoner *after* his arrest or the search of the premises where the arrest takes place. Searches and seizures of the latter kind have always been held by the courts to be lawful.

We are of the opinion that an officer may arrest a person without a warrant for a crime committed or attempted in his presence, and in cases where a criminal offense, felony or misdemeanor, has in fact been committed and the officer has reasonable ground for believing that the person to be arrested has committed it; that incidental thereto the officer may seize any evidence of the crime found on the person of the prisoner or on the premises where the arrest takes place. This, however, does not mean that a raid may be made first, on mere suspicion, and an arrest made thereafter, upon the evidence obtained by such a raid. The officer in making an

arrest without a warrant must first have some independent knowledge, not necessarily such evidence as is required to make it admissible in court, but reliable information that a crime has been committed, in order to make his arrest of the prisoner lawful. But when this condition has been fulfilled, and the arrest accordingly is lawful, the officer may follow up such arrest by searching the person of the prisoner and the premises where the arrest takes place. Such incidental search and seizure is not an unreasonable search and seizure in the constitutional sense and any articles bearing upon the crime, obtained in this manner, are properly admissible in evidence at the trial.

ENTRAPMENT IN SECURING EVIDENCE

(No. 8693—*Commissioner of Police—W. V. D.—March 6, 1935—5 pp.*)

The fact that police officers requested and paid for a massage for the purpose of securing evidence of violations of the city's ordinances by massage parlor operators does not constitute entrapment nor render their testimony incompetent.

Citations:

Ordinance: Code '31: 3297.

Cases: State v. Stickney, 53 Kan. 308 (1894).
Commonwealth v. Hollister, 157 Pa. 13 (1893).
People v. Ficke, 343 Ill. 367 (1931).
People v. Hartford Life Insurance Co., 252 Ill. 398 (1911-12).
City of Evanston v. Myers, 172 Ill. 266 (1898).
Grimm v. United States, 156 U. S. 604 (1894).
Andrews v. United States, 162 U. S. 420 (1896).
Rater v. State, 49 Ind. 507 (1875).
People v. Rush, 113 Mich. 539 (1897).
Board of Commissioners of Excise v. Backus, 29 How. Pr. 33 (N. Y. 1864).

OPINION OF FOREGOING SYNOPSIS

In reply to your letter of March 2, 1935, requesting an opinion as to whether the action of police officers in arresting operators of massage parlors for violating section 3297 of the Revised Chicago Code of 1931 and its amendments, are guilty of entrapment when the police officers request a massage and pay for the same, please be advised that from the facts as submitted in your letter, the police officers acted within the law.

The massage parlors mentioned in your letter are licensed by the city and there can be no question of the rightful entry of the police officers. It is not necessary that a violation of the law be observed to make their entry legal. The places being licensed to give massages for pay is an invitation to the public to patronize them and the police officers entering in the guise of patrons violated no legal right or privilege of the defendants. The fact that the police officers asked for massages and paid for the same would not act as a bar to the prosecution if the operators of massage parlors in giving the massages violated the law. While it was the purpose of the police officers to detect violations of the ordinance it is a well-known fact that criminals usually work in secrecy; thus, it often becomes necessary to resort to various artifices in order to enforce the law and punish its violation.

There is a very clear distinction between inducing a person to do an unlawful act and setting a trap to catch him in the execution of criminal

designs of his own conception. It may therefore be stated as a general rule that if the criminal design originated with the perpetrator of the act he cannot escape conviction merely by reason of the fact that a police officer laid a trap or facilitated the execution of the scheme or that a police officer in a passive manner appeared to co-operate with the perpetrator in order that he might be detected in the act. * * *

* * * * *

The police officers in the cases referred to in your letter asked for what it was lawful for the defendants to give, namely, a massage. Their purpose was in good faith to secure evidence against persons believed to be guilty of violating the ordinance and the mere fact that they furnished an opportunity for the commission of the violation did not constitute entrapment or render their testimony incompetent.

QUASI-CRIMINAL PROSECUTIONS

(No. 7862—*City Prosecutor—M. H. F.—December 27, 1932—1½ pp.*)

A quasi-criminal prosecution is a civil action at law to which rules of civil proceedings apply.

The constitutional provisions against unlawful searches and seizures and against compelling a person in a criminal case to be a witness against himself are limited to criminal prosecutions.

Citations:

Case: *Boyd v. United States*, 116 U. S. 616, 633 (1885).

Other reference: *Cooley, Constitutional Limitations* (8th ed.), p. 610.

IMPRISONMENT FOR NON-PAYMENT OF FINE*

(No. 7760—*City Sealer—E. R. D.—September 27, 1932—1½ pp.*)

When a person convicted of a violation of an ordinance is fined and fails to pay the fine, he may be imprisoned for the period necessary to work out that fine, unless released sooner by an order of a court of competent jurisdiction.

Citation:

Case: *Chicago v. Kunowski*, 308 Ill. 206 (1923).

ENFORCEMENT OF ORDINANCES AGAINST PREMISES IN RECEIVERSHIP

(No. 8801—*Acting Commissioner of Streets and Electricity—M. H. F.—June 24, 1935—4½ pp.*)

Prosecutions may be begun against either federal or state court receivers without the previous leave of the court.

Court receivers, in common with other managers of property, are

*See also Opinion No. 8477, p. 424, on the limitation of the City Council's power to impose fines.

required to obey valid municipal ordinances and may not escape the ordinances by using the cloaks of court appointments.

The Commissioner of Streets and Electricity and the Commissioner of Police might be cited in contempt proceedings for interfering with the court's receiver in his management, if the Commissioner of Streets and Electricity were to close a building being operated by a receiver or place policemen upon the premises to prevent their use until the Code provisions had been complied with.

Citations:

Statutes: USCA Title 28, sec. 125.

SH '33, 110: 154.

Ordinance: Code '31: 1810-58.

RIGHT TO BAIL

(No. 7388—*Commissioner of Police—C. J. A.—December 15, 1931—*
4½ pp.)

A person accused of a crime is entitled to bail from an incarceration on account of the crime except for capital offenses, where the proof is evident or the presumption great, but where a person is quarantined on account of a communicable disease, he is not entitled to be released on bail from quarantine.

Citations:

Constitution: Illinois, art. II, sec. 7.

Statute: Criminal Code, art. XIII, sec. 2.

Ex parte Arata, 198 Pac. 814 (Cal. App. 1921).

Ex parte Dayton, 199 Pac. 548 (Cal. App. 1921).

People v. Robertson, 302 Ill. 422 (1922).

ASSESSMENT OF COSTS OF PROSECUTION

(No. 7149—*City Prosecutor—J. F. G.—September 26, 1931—1 p.*)

In all cases prosecuted for violation of any of the city ordinances, the costs should be taxed against the defendants and collected in the event that the violation is proved or admitted.

REFUND OF FINE FOR ORDINANCE VIOLATION

(No. 8061—*Chairman, Committee on Finance—C. N.—May 15, 1933—*
2 pp.)

The city is not obliged to refund a fine paid for violation of an ordinance even though the case is later reopened and a discharge obtained.

Citations:

Ordinance: Code '31: 4210.

Other reference: 25 CJ 1164, par. 38.

ENFORCING INVALID ORDINANCE

(No. 7536—*Commissioner of Police—R. N.—April 11, 1932—1½ pp.*)

Sections 1007 and 4281 of the Chicago Code of 1931, being identical with certain sections of the 1922 Code that were held invalid, cannot be enforced.

Citations:

Ordinances: Code '22: 366.

Code '31: 1007, 4281.

Case: Chicago v. Schultz, 341 Ill. 208 (1931).

Court Appeals: Where an appeal from a judgment finding the defendant guilty of violating a city ordinance involves the question of whether the ordinance is applicable to the appellant's particular business, the construction rather than the validity of the ordinance is concerned, and a direct appeal cannot be taken to the Supreme Court even though the trial judge certified that the validity of an ordinance is involved and that the public interest requires a direct appeal.—*Chicago v. Iroquois Iron and Steel Co.*, 361 Ill. 330 (1935).

B. INSPECTION AND PERMITS

(1) *Inspection**

PAYMENT OF INSPECTION FEES PENDING REDUCTION

(No. 7097—*City Comptroller—L. H.—August 28, 1931—2½ pp.*)

The Comptroller may enter into an escrow agreement for the payment of inspection fees pending possible Council action to reduce such fees, but a receipt for a certified check of a sufficient amount stating the same will be held until the Council acts, is more simple and adequate.

INSPECTION FEE FOR SIGN NOT USED

(No. 7584—*Chairman, Committee on Finance—R. N.—May 23, 1932—2½ pp.*)

A bank that has closed its doors is not entitled to the cancellation of a warrant for a sign inspection fee merely because the projecting sign is not in use, as the fee covers both compensation for the privilege of maintaining the sign and the cost of inspecting it.

Citations:

Ordinances: Code '31: 957, 959.

*See opinions on p. 377 and Opinion No. 7547, p. 375.

INSPECTION OF COLD STORAGE PLANTS

(No. 7140—City Comptroller—M. H. F.—September 22, 1931—6 pp.)

There is nothing in the Illinois Uniform Cold Storage act which shows a clear intention of the legislature to withdraw from municipalities the power to inspect cold storage plants and exact an inspection fee.

The city has ample authority to pass and enforce an ordinance for the inspection of cold storage plants.

Citations:

- Statutes: SH '29, 24: 65.65, 65.66, 65.78 (Cities and Villages act).
Id., 56½: 80-93 (Uniform Cold Storage act).
Ordinances: Code '22: 3679, 3682, 3684.
Other references: 16 Op. Corp. Counsel, 531.
3 McQuillin, Mun. Corp., sec. 1087.

DETERMINING INSPECTION FEE

(No. 6865—Acting Comptroller—M. H. F.—April 14, 1931—2½ pp.)

The inspection fees for cooling plants under section 3684 of the City Code of 1922 should be based on individual compressors.

Where an inspection is made and the fees earned under an ordinance and the ordinance is subsequently amended, the assessment and collection should be according to the terms of the ordinance as it existed before amendment.

Citation:

- Ordinance: Code '22: 3684, as amended Coun. J. (1930-31), p. 4198.

COLLECTION OF INSPECTION AND PERMIT FEES FOR REFRIGERATION SYSTEMS

(No. 8827—Mayor—E. L. M.—July 24, 1935—4 pp.)

While the city may collect an inspection fee for each inspection made under the refrigerating systems ordinance, it can collect permit fees after installation only through the imposition of fines.

Inspection fees are required for refrigerating systems other than household single unit systems.

Citations:

- Ordinances: Code '31: 3475, 3477, 3478, 3486.

REFRIGERATION INSPECTION FEES

(No. 6899—*Acting Chief Inspector, Department for the Inspection of Steam Boilers, etc.*—W. W.—May 9, 1931—2½ pp.)

Because, by order of the court, only commercial ice companies obtained an agreement by the city to refrain from enforcing the collection of refrigeration inspection fees during litigation, these fees may be collected from enterprises other than these manufacturing and distributing companies.

Citation:

Ordinance: Code '22: 3677-3686, as amended Dec. 11, 1930.

ICE CREAM FACTORY INSPECTION WHEN PRODUCTS WITHOUT MILK OR CREAM

(No. 8135—*President, Board of Health*—B. J. K.—August 2, 1933—2½ pp.)

The ordinance requiring the inspection and supervision of ice cream factories does not apply to a plant which manufactures and sells frozen food products which contain no milk or cream.

Citation:

Ordinance: Code '31: 3076-81.

INSPECTION FEES FOR ICE CREAM VEHICLES

(No. 6922—*Commissioner of Health*—L. H.—May 29, 1931—3 pp.)

Since the City Code requires an inspection fee for vehicles of ice cream manufacturers, the vehicles of caterers who deliver ice cream to the consumer and the vehicles of ice cream manufacturers whose wares are peddled should be inspected as well as the vehicles of wholesale dealers.

INSPECTION FEES FOR ICE CREAM MANUFACTURERS

(No. 7599—*President, Board of Health*—M. H. F.—June 8, 1932—5 pp.)

Vehicles used by ice cream manufacturing companies to deliver products directly to consumer should be included in the computation of the annual inspection fee, as well as vehicles which deliver only to retail dealers.

The payment of fees for peddler licenses by an ice cream manu-

facturing company is for an additional privilege and does not affect the fees due from that company for its annual inspection.

Citations:

Ordinance: Code '31: 3076-77.

Case: Harder's Storage Co. v. Chicago, 235 Ill. 88 (1908).

LIABILITY FOR THEATER INSPECTION FEE*

(No. 7669—*Deputy, Acting for Mayor, Building Department—F. J. B.*
—*July 27, 1932—2½ pp.*)

Theater building owners, and not the lessees, are responsible for the payment of the theater inspection fee.

A foreign corporation owning real estate or leases in this state must be licensed to do business in this state, and the city may sue such corporation in the courts of this state.

Citations:

Statute: SH '29, 32: 87.

Ordinance: Code '31: 1199(h).

INSPECTION OF BEVERAGE DEALERS AND MANUFACTURERS' ESTABLISHMENTS

(No. 6894—*Acting Commissioner of Health—L. H.—May 6, 1931—2½ pp.*)

The establishments of beverage manufacturers and dealers cannot be inspected under chapter 39, article 17 of the City Code of 1922, due to a court injunction, but they can be inspected under an ordinance of June 18, 1930, regulating food purveyors.

Citations:

Ordinances: Code '22: 1886-96.

Coun. J. (1930-31), p. 3216.

INSPECTION OF PACKING PLANTS NOT IN CITY

(No. 8301—*President, Board of Health—B. J. K.—February 16, 1934—1 p.*)

Where products of a packing company that is not located in the city are partly disposed of in the city, the Board of Health may inspect their plant on the payment of reasonable inspection fees.

*See also Opinion No. 7096, p. 444, on theater inspection.

ELECTRICAL INSPECTION OF PUBLIC UTILITIES*

(No. 7841—*Chairman, Finance Committee—E. R. D.—December 15, 1932—2½ pp.*)

The city should refund fees paid for the inspection of electrical construction work by a company that did such work for a public utility, as public utilities are by ordinance exempt from city inspection of their electrical equipment.

Citation:

Ordinance: Code '31: 1821.

INSPECTION FEE FOR RAILROAD SCALES

(No. 7860—*Superintendent, Bureau of License—M. H. F.—December 27, 1932—1½ pp.*)

Railroad companies operating scales not used exclusively by the carrier, but which may be used to any extent in weighing commodities for the general public, must comply with the city ordinance and pay the prescribed fees for the inspection of such scales.

No inspection fee may be exacted for the inspection of railroad scales as are used exclusively in weighing freight received for transportation.

Citations:

Ordinances: Code '31: 528, 535, 2941.

Case: Chicago v. Chicago, Great Western Railroad, 348 Ill. 193 (1932).

Opinions No. 7141 of September 22, 1931, to the Prosecuting Attorney and No. 7859 of December 27, 1932, to the City Collector, are in accord with the above opinion.

INSPECTION OF RAILROAD BILLBOARDS

(No. 7776—*Deputy Acting for Mayor, Department of Buildings—C. J. A.—October 13, 1932—3½ pp.*)

The City Code makes no distinction between railroad property and any other property in the city so far as the regulation of billboards and billboard inspection fees are concerned.

Citations:

Ordinances: Code '05: 109.

Code '11: 701.

Code '22: 909.

Code '31: 1666.

Case: Chicago v. Gunning System, 214 Ill. 628 (1905).

Other reference: Op. Corp. Counsel (1907-08), p. 446.

*See also Opinion No. 7710, p. 427, on electrical inspection.

(2) *Permits and Privileges**

LEGALITY OF FREE TEMPORARY PERMITS

(No. 7642—City Clerk—W. V. D.—July 8, 1932—1½ pp.)

Granting free temporary permits under sec. 3578 of the Chicago Code is illegal as granting privileges to a particular class.

Citations:

Constitutions: United States, Fourteenth Amendment.
Illinois, art. 4, sec. 22.

Statute: SH '31, 24: 674.

Ordinance: Code '31: 3578.

Cases: Connolly v. Union Sewer Pipe Co., 184 U. S. 540 (1901).
Marallis v. Chicago, 349 Ill. 422 (1932).

ISSUANCE OF PERMITS WHERE TITLE TO PROPERTY IN DISPUTE

(No. 7292—Commissioner of Public Works—C. J. A.—November 13, 1931—2½ pp.)

The Commissioner of Public Works in issuing permits need not pass judgment upon any disputed title to property. Where the applicant for the permit shows a *prima facie* title, the commissioner is at liberty to issue the permit, leaving it to the applicant to settle the dispute with any other parties that are concerned.

Citation:

Case: Bates v. Illinois Central R. R., 66 U. S. 204 (1861).

BILLING FOR PERMIT AND INSPECTION FEES UNDER REVISED CODE

(No. 7173—City Comptroller—R. N.—October 7, 1931—2 pp.)

Until the provisions of the Revised Chicago Code of 1931 are amended, billing for permit and inspection services must be on the basis set forth in such Code and not according to prior ordinances, as the Code supersedes all previous ordinances on the subject.

Opinion No. 7174 of October 7, 1931, to the Commissioner of Buildings is in accord with the above opinion.

*See also opinions, pp. 671-685, on special uses of streets.

VALIDITY OF SPECIAL PERMIT CONTAINING PROVISIONS OF A PREVIOUS CODE

(No. 7955—*Commissioner of Public Works—J. F. G.—February 23, 1933—1½ pp.*)

A special permit which had been issued after the Code of 1931 was adopted is not invalid because it contains quotations of sections of the Code of 1922 since these provisions are substantially similar to those in the 1931 Code.

Citations:

Ordinances: Code '22: 1728-29, 1734.
Code '31: 2833-35, 2872-73.

PERMIT FOR OPEN-AIR MEETINGS

(No. 8437—*M. D. S.—June 16, 1934—1 p.*)

No open-air meetings can be held without first obtaining a permit therefore from the Commissioner of Police.

PERMIT AND BOND FOR ERECTION OF BILLBOARD

(No. 8302—*Deputy, Acting for the Mayor, Department of Buildings—O. W. H.—February 16, 1934—1½ pp.*)

The person, firm or corporation that erects a billboard or signboard, and not the owner or maker thereof is the one who should obtain the permit from the Department of Buildings and who should furnish the required bond.

Citation:

Ordinance: Code '31: 1671(b).

PERMIT TO INSTALL GASOLINE STATION TANKS

(No. 8000—*Division Marshal in Charge of Fire Prevention—W. L. S.—April 6, 1933—1½ pp.*)

The Division Marshal in charge of fire prevention may not issue a permit for the installation of tanks in a gasoline filling station on the basis of a Council order when an ordinance prohibits the issuance of the permit.

PERMITS FOR GASOLINE FILLING STATIONS UNDER CONFLICTING FRONTAGE CONSENT REQUIREMENTS

(No. 7231—Division Marshal in Charge of Fire Prevention—W. L. S.—October 29, 1931—3½ pp.)

If the permits for gasoline filling stations were properly issued under section 3274 of the 1931 Code even though the frontage consents required by that section were inconsistent with those of another section of this Code, these permits should not be revoked. Gasoline filling station permits should continue to be issued under this section and the City Council will doubtless make the frontage consent requirements conform to those of section 3274.

Citations:

Ordinances: Code '22: 2279(a).
Code '31: 2670, 2678, 3274.

PERMIT FOR INSTALLATION OF FILLING STATION TANKS

(No. 6745—Division Marshal in Charge of Fire Prevention—S. L. G.—August 7, 1930—3 pp.)

No permit can be issued for the installation of filling station tanks on a lot, if any boundary of that lot is less than 200 feet from the nearest boundary of any lot used for a school, hospital, church or theater.

Citation:

Ordinance: Code '22: 2279(b), as amended April 12, 1928.

EFFECT OF INJUNCTION AGAINST ISSUANCE OF GASOLINE TANK PERMIT

(No. 7494—Division Marshal in Charge of Fire Prevention—W. L. S.—March 15, 1933—4 pp.)

A court injunction which because of fraudulent frontage consent petitions, restrains the city from issuing a permit for the installation of gasoline tanks on the premises named, pertained only to that application and to the petitions and other documents connected with the application.

When a new application is properly made for the installation of the gasoline tanks on the same premises and when the frontage consent petitions are properly filed, a permit can be issued, provided that no consideration whatsoever is given any of the documents connected with the old application.

PERMIT FOR SELLING FROM VEHICLES ON PUBLIC PROPERTY*

(No. 8760—*M. H. F.*—*May 3, 1935*—1 p.)

A person who wishes to sell flowers from a vehicle parked on public property is required to obtain a permit from the Bureau of Compensation upon recommendation by the ward alderman. When the vehicle is parked on private property such a permit is not necessary.

LIQUOR PERMITS FOR DRUG STORES

(No. 6830—*Secretary, Commission on Revenue—L. H.*—*January 22, 1931*—2 pp.)

While the city has no power to license druggists, the issuance of liquor permits to druggists for certain restricted purposes may be lawful.

Citations:

Ordinance: Code '22: 1108, as amended.

Statutes: SH '29, 24: 65, 45.

PERMITS TO DUMP REFUSE ON PRIVATE PROPERTY

(No. 7674—*President, Board of Health—L. H.*—*July 29, 1932*—2 pp.)

An application for the privilege of dumping refuse on private property should be held in abeyance until the day following the next regular meeting of the City Council when, if no action has been taken by the Council, the head of the Health Department may exercise his discretion in approving or rejecting such application if the applicant files a bond as specified in the ordinances; however, if the City Council directs the refusal of said application, the permit must be denied.

Citation:

Ordinance: Code '31: 2392, 2429.

REMOVAL OF ILLUMINATED SIGNS FOR NON-PAYMENT OF PERMIT FEES

(No. 7220—*Chairman, Committee on Finance—F. J. B.*—*October 27, 1931*—5½ pp.)

A permit issued for the erection and maintenance of an illuminated sign was in force and effect for only one year after its issuance, unless previously revoked by the Mayor or City Council and it could be renewed by payment of the annual fee, but the failure to renew the

*See also opinions, pp. 671-685; on special uses of streets.

permit rendered the sign an unlawful obstruction which was removable by the Commissioner of Public Works.

If a sign, which was lawfully removed because no permit therefor was obtained, had no salable value and the owner made no effort to repossess the sign after paying the inspection fee due, the city incurred no liability by disposing of it as junk.

Citations:

Statute: SH '29, 24: 65.9.

Ordinances: Code '22: 1642-48, 3710-11, 3699-3700.

Case: Hanrahan v. Chicago, 289 Ill. 400 (1920).

REFUND OF PERMIT FEES

(No. 7085—*Chairman, Finance Committee—L. H.—August 21, 1931—1½ pp.*)

The provision which prohibits a refund of license fees applies also to fees paid for permits.

Citation:

Case: *Arms v. Chicago*, 314 Ill. 316 (1925).

REFUND OF ERRONEOUS PERMIT OR LICENSE FEES

(No. 7084—*City Comptroller—L. H.—August 21, 1931—1½ pp.*)

No rebate should be made or refunds allowed, except by Council action, for license or permit fees collected through error or otherwise.

REFUNDS OF FEES IF LICENSE OR PERMIT REVOKED

(No. 7280—*Mayor—F. J. B.—November 10, 1931—5 pp.*)

Where the revocation of a permit or license occurs by reason of some act or omission on the part of the grantee or licensee, no refund may be had.

Where Bureau of Compensation permits are revoked because of the objections of persons conducting regular places of business and not because of any actions on the part of the permittees, a prorated refund may be made.

Citations:

Ordinances: Code '31, 475, 477, 863-881, 929-963, 2896, 2900, 2913, 3423, 3433, 4058-4064.

Cases: *People v. Field*, 266 Ill. 609 (1915).

Hibbard v. Chicago, 173 Ill. 91 (1898).

PERMIT FEE PAID UNDER INVALID ORDINANCE

(No. 7020—*Chairman, Committee on Finance—F. J. B.—July 20, 1931—4½ pp.*)

A fee paid for a permit which has been revoked because issued under an invalid ordinance cannot be recovered from the city because it was voluntarily paid to the municipality with knowledge of the facts.

Citations:

Ordinances: Code '22: 430, 945.

Cases: *Michigan-Lake Building Corp. v. Hamilton*, 340 Ill. 284 (1931).
Hibbard, Spencer, Bartlett and Co. v. Chicago, 173 Ill. 91 (1898).
Burton Co. v. Chicago, 236 Ill. 383 (1908).
Chicago Parking Co. v. Chicago, 88 Ill. 221 (1878).
Chicago v. McGovern, 226 Ill. 403 (1907).
Chicago v. Drogasawacz, 256 Ill. 34 (1912-13).
City of Buffalo v. Stevenson, 207 N. Y. 258 (1913).
Roth v. Chicago, 207 Ill. App. 117 (1918).
Arms v. Chicago, 251 Ill. App. 532 (1928-29).
Rohde v. Chicago, 254 Ill. App. 590 (1929).
Elston v. Chicago, 40 Ill. 514 (1863-66).

Other references: *Op. Corp. Counsel* (1920-23), pp. 136, 188.
43 CJ 349.

McQuillin, Mun. Corp. (2nd ed.), secs. 1021, 1117.
Dillon, Mun. Corp. (6th ed.), sec. 1621.

REFUND OF PERMIT FEES FOR ELECTRICAL CONSTRUCTION

(No. 7449—*Chairman, Committee on Finance—E. R. D.—February 16, 1932—2 pp.*)

When the Department of Gas and Electricity issued a permit for electrical construction, a refund should not be made, under any circumstances, so that the practice of applying for a permit before obtaining a contract for construction, may be discouraged.

Section 2913 of the 1931 City Code does not apply to the electrical inspection fees, since electrical inspection fees are not license fees.

Citation:

Ordinance: Code '31: 2913.

RECOVERY OF CANOPY PERMIT FEE FOR UNUSED PERIOD*

(No. 7056—*Chairman, Committee on Finance—J. A. B.—August 4, 1931—3 pp.*)

Where a license or permit fee is paid under a valid ordinance to the city, the person paying the fee cannot recover.

If a fee is paid under an invalid ordinance the party cannot recover

*See also opinions, pp. 683, 684, on canopies and canopy permits.

if the fee is paid voluntarily and with full knowledge of the facts unless there is a showing of compulsion, actual or mere duress, fraud or any other circumstance which would make the payment involuntary.

A canopy permit fee for a ten year period, voluntarily paid cannot be partially recovered when the canopy is removed voluntarily before the ten year period elapsed.

Citations:

- Cases: *Chicago v. Northwestern Mutual Life Insurance Co.*, 218 Ill. 40 (1905).
Illinois Glass Co. v. Chicago Telephone Co., 234 Ill. 535 (1908).
Yates v. Royal Insurance Co., 200 Ill. 202 (1902-03).

REFUND OF SCALE PERMIT FEE FOR UNUSED PORTION

(No. 8376—*Chairman, Committee on Finance*—A. F. G.—April 30, 1934—2 pp.)

Where compensation for a permit to install and use a scale in a roadway was paid for ten years in advance and the scale was voluntarily removed before the ten years expired, the city is not obligated to refund the unused portion of this compensation.

Citations:

- Ordinances: Code '31: 2913.
Coun. J. (1928-29), p. 3953.
Case: *Holder v. City of Galena*, 19 Ill. App. 409 (1886).

COMPENSATION FOR PRIVILEGES GRANTED THE RELIANCE ELECTRIC COMPANY

(No. 6699—*City Comptroller*—L. H.—June 20, 1930—3 pp.)

The city is entitled by ordinance for privileges granted to the Reliance Electric Company to compensation based on the gross receipts from installation and construction charges as well as from central station service.

Citations:

- Ordinances: Coun. J. (1922-23), p. 2003 (*Reliance Electric Co. ord.*).
American District Telephone Co. (ordinance of 1905).

C. BUILDING REGULATION

(1) *General Building Regulations*

PROSECUTION OF BUILDING VIOLATIONS

(No. 7660—*Deputy, Acting for the Mayor, Department of Buildings—W. L. S.—July 23, 1932—3½ pp.*)

A person violating an ordinance prohibiting certain acts under fines, penalties or imprisonment commits a quasi-criminal offense for which he may be fined or imprisoned.

Where fines imposed for violation of the building ordinance have not been paid, further violations may be prosecuted by an inspector of the Department of Buildings swearing to a complaint and obtain a warrant for the arrest of the offender.

Citations:

Statute: SH '29, 24: 80.

Case: Chicago v. Kunowski, 308 Ill. 209 (1923).

CLOSING OF UNSAFE BUILDING UNDER REPAIR

(No. 7272—*Commissioner of Buildings—C. J. A.—November 9, 1931—2½ pp.*)

Where a building has been properly constructed but subsequently becomes out of repair or fails to comply with new ordinances adopted since the construction of the building, the Commissioner of Buildings is not required to close it while necessary repairs are being made, unless the defects are of such a fundamental nature that the building is wholly unsafe in the opinion of the commissioner.

Citations:

Ordinances: Code '31: 1181, 1199.

PAYMENT OF BUILDING INSPECTION COSTS

(No. 7547—*M. F. M.—April 16, 1932—2½ pp.*)

The city must periodically inspect buildings in order to exercise its power and duty to prevent fires. The owner of the buildings, for whose benefit the inspection is made, can be required to pay the cost of the inspection.

Citations:

Statute: Cah. '31, 24: 65 (63).

Ordinance: Code '31: 1199(a).

REGULATION OF BUILDING MATERIALS*

(No. 8666—*Commission for Revising Building Code*—A. F. G.—February 6, 1935—4½ pp.)

Lath, plaster, or any substitute therefore, may be used in covering partitions or ceilings in buildings, since the provisions of the Building Code with regard to this matter have been held invalid by the court as not permitting substitute construction materials of a satisfactory character. Future ordinances on the subject should permit the use of materials equal in strength, durability, fire resisting and sanitary qualities to those specified in the ordinance.

Citations:

Ordinances: Code '11: 605.

Code '31: 1591.

Case: McCrey v. Chicago, 292 Ill. 60 (1920).

USE OF READY MIXED CONCRETE IN CONSTRUCTION WORK

(No. 6726—C. J. A.—July 22, 1930—3½ pp.)

The use of ready mixed concrete on construction jobs does not conform with the provisions of the Code which requires that all concrete should be mixed on the premises.

Citations:

Ordinances: Code '22: 730, 771, 776, 841, 842.

USE OF NON-RUSTPROOF STEEL

(No. 7203—*Committee on Building Ordinances*—L. H.—October 22, 1931—1½ pp.)

The city has no power to prohibit steel that has not been rust-proofed from entering the city but it may insert in the building code a requirement that all steel used in buildings for structural requirement must be subjected to a rust resisting process.

INSPECTION FEES FOR STATE BUILDINGS LEASED TO PRIVATE CONCERNS

(No. 7991—*Deputy, Acting for the Mayor, Department of Buildings*—M. H. F.—April 3, 1933—3½ pp.)

Inspection fees cannot be collected from the state government for

*See also Opinion No. 7953, p. 86 on regulation of building materials.

buildings owned by the state even when those buildings have been leased to private concerns to be used for non-state purposes.

Citations:

Ordinance: Code '31: 1199(h).

Other references: Op. Corp. Counsel (1914-15), p. 106.

Id. (1915-16), p. 182.

Id. (1920-23), p. 263.

Id. (1923-24), p. 862.

INSPECTION OF VENTILATION AND LIGHTING OF PLACE OF EMPLOYMENT

(No. 6987—*Commissioner of Health—M. H. F.—July 6, 1931—2 pp.*)

A building where one or more persons are employed is subject to an annual inspection by the city to see that the building is not overcrowded and has adequate light and ventilation, and it is also subject to a fee for that inspection.

Citations:

Ordinances: Code '22: 2153-55.

Other reference: 16 Op. Corp. Counsel 523.

INSPECTION OF MECHANICAL VENTILATION EQUIPMENT

(No. 7908—*President, Board of Health—M. F. M.—January 19, 1933—1 p.*)

An annual inspection of all mechanical ventilation equipment in public and semi-public buildings and places of employment is to be made by the Commissioner of Health to see that it is in proper operating condition, but where the buildings are not equipped with ventilating equipment, no inspection fee may be charged.

Citation:

Ordinance: Code '31: 2230.

INSPECTION OF TANKS ON BUILDINGS

(No. 8449—*Deputy for Mayor, Department of Buildings—A. F. G.—June 27, 1934—3½ pp.*)

The city has power to require owners of buildings on which tanks have been erected for many years to subject such tanks to an examination by a licensed architect or structural engineer and if found unsafe to require them to be put into a safe condition as such is a reasonable exercise of the powers conferred upon the city to prevent fires and regulate the construction of buildings.

Citations:

Statute: SH '33, 24: 65.62-62.65.

Case: Kleaver Shampay Karpel Kleaners, Inc. v. Chicago, 323 Ill. 368 (1927).

REGULATIONS OF WARM AIR HEATING SYSTEMS AND CONTRACTORS

(No. 8706—*M. H. F.*—*March 13, 1935*—2 pp.)

The enactment of Senate Bill 114, regulating the practice of warm air heating contractors, and the like, might result in an implied repeal of the city's authority to require those contractors to register and pay a registration fee, but it would not prevent the city from enforcing its own regulations as to construction requirements, standards, size of pipes, et cetera.

Citations:

Ordinances: Code '31: 1496-A, 1496-K.

Case: Chicago v. Wonder Heating and Ventilating Systems, 345 Ill. 496 (1932).

REGULATION OF SPRINKLER SYSTEM

(No. 7469—*Chairman, Committee on Building Ordinances*—*W. L. S.*—*March 1, 1932*—5½ pp.)

While a building may not have been required by ordinance to be installed with a sprinkler system, yet, if such has been installed, the Chief Fire Prevention Engineer has the power, under an ordinance of the City Code, to require that the sprinkler system conform to the standard practice in the spacing of head, size of piping, and protection of areas.

Citations:

Ordinances: Code '22: 291, 297.

Code '31: 2450-55.

Case: Chicago v. Washington Home, 289 Ill. 206 (1920).

WRECKING BUILDINGS*

(No. 8657—*Deputy, Acting for the Mayor, Department of Buildings*—*A. F. G.*—*January 31, 1935*—5 pp.)

The Department of Buildings should deal directly with the Illinois Emergency Relief Commission when it becomes necessary to tear down a building and the work is to be undertaken by the use of labor furnished by the Illinois Emergency Relief Commission.

The duty of regulating the construction of buildings and the power to tear down buildings that are dangerous or that were erected in violation of the building ordinances is placed with the Commissioner of Buildings. The duty of the Fire Department to tear down structures applies only to those small frame buildings and dangerous parts

*See also opinions on nuisance abatement under "Buildings". pp. 384-389.

of walls and buildings which are left standing after a fire and which can be handled with the limited facilities of the Fire Department.

Citations:

Ordinances: Code '31: 404, 409-414.

LACK OF FUNDS TO RAZE BUILDINGS

(No. 7315—*Commissioner of Building—E. R. D.—November 24, 1931—1 p.*)

If the Department of Buildings has no funds to defray the expense of razing and removing a building, no other course remains but to proceed in accordance with paragraphs 409 and 411 of the City Code of 1931.

Citation:

Ordinance: Code '31: 409, 411.

LIABILITY FOR COSTS OF WRECKING UNSAFE BUILDING

(No. 6972—*City Comptroller—M. F. M.—June 25, 1931—1 p.*)

The holder of a certificate of sale of certain property to which he has received no deed and which is managed by a receiver, is not liable for the costs of wrecking an unsafe building on that property.

Citation:

Case: *Strauss v. Tuckhorn*, 200 Ill. 75 (1902-03).

WRECKING OF CITY-OWNED BUILDINGS BY THE CITY ARCHITECT

(No. 8254—*Deputy, Acting for Mayor, Department of Buildings—C. N.—December 27, 1933—3 pp.*)

The Deputy Acting for the Mayor, Department of Buildings, is exempt from the details of ordinary supervision which are imposed by the City Code for the wrecking of buildings when he directs the City Architect to proceed with the wrecking of certain city-owned buildings. The only duty of the deputy is to acquaint the City Architect with the ordinance providing for the safety of workmen.

Citations:

Ordinances: Code '31: 1197, 1198, 1199.
Coun. J. (1933-34), p. 1251.

REGISTRATION OF CONTRACTOR'S BONDS

(No. 8138—*Department of Buildings—C. N.—August 4, 1933—2½ pp.*)

If a partnership was formed as a subterfuge to evade the posting of individual bonds for registration as contractors and to operate un-

der one bond, the Department of Buildings may refuse to register such partnership.

Citation:

Reference: Gilmore, Partnership, secs. 1, 4.

DISCONNECTION OF WATER SUPPLY SYSTEMS FROM DIFFERENT SOURCES

(No. 8902—*Chairman, Commission for Revising the Building Code—
A. F. G.—October 24, 1935—3 pp.*)

The provision of the proposed building code requiring owners of buildings, in which two or more water supply systems from different sources are cross-connected, to break the connection within one year after the passage of the ordinance, is valid as a reasonable requirement for promotion of public health.

Citations:

Statute: Cities and Villages act, art. V, sec. 1, pars. 66, 78.

Cases: Moy v. Chicago, 309 Ill. 242, 244 (1924).

Gundling v. Chicago, 176 Ill. 340 (1898).

Koy v. Chicago, 263 Ill. 122, 132 (1914).

MOVING OF FRAME BUILDING CONVERTED INTO A BRICK BUILDING

(No. 6423—*Commissioner of Public Works—F. J. C.—May 1, 1929—
4 pp.*)

When a frame building is walled in by brick walls so that the new walls conform to the building regulations for brick buildings, the structure is no longer to be considered as a frame building but as a brick building, and as a brick building, it can be moved from its present location under the same conditions as other brick buildings of a similar type, provided that all other provisions of the ordinances are properly complied with.

Citation:

Ordinance: Code '22: 923.

(2) Permits

APPLICATION FOR BUILDING PERMIT

(No. 7903—*Deputy, Acting for the Mayor, Department of Buildings—
W. L. S.—January 16, 1933—2½ pp.*)

An applicant for a building permit should be required in all cases to apply at the same time for a certificate of occupancy under the zoning ordinance.

ISSUANCE OF BUILDING PERMIT

(No. 7791—*Deputy, Acting for the Mayor, Department of Buildings—W. L. S.—October 24, 1932—1½ pp.*)

If the proposed building conforms to the laws and ordinances, the Deputy Acting for the Mayor, Department of Buildings, has no discretion, but must issue a permit for the building. A deed restriction on the property is of no importance so far as the Department of Buildings is concerned.

BUILDING PERMIT FOR UNITED STATES POST OFFICE*

(No. 7240—*Commissioner of Buildings—L. H.—October 31, 1931—2 pp.*)

As the Legislature authorized the acquisition of a particular tract of ground by the United States, no building permit is required of the United States to build the new post office on such land and the responsibility for the proper erection of this building lies entirely within the control of the United States government.

Citation:

Statute: Ill. Laws (1923), p. 628, sec. 2.

WITHHOLDING PERMIT UNTIL ORDINANCE REPEALED— JUDICIAL REVIEW OF POLICE REGULATION

(No. 6475—*Commissioner of Buildings—J. G. D.—July 18, 1929—5 pp.*)

Where an applicant for a building permit was entitled to it because of having complied with the then ordinances and the permit was wrongfully withheld from him, he is still entitled to the permit even though the ordinances have been subsequently amended.

The exercise of police power is subject to judicial review and property rights cannot be destroyed by arbitrary enactment.

Citations:

Cases: *People v. Lueders*, 287 Ill. 107, 117 (1919).

Dobbins v. Los Angeles, 195 U. S. 223 (1903-04).

EXPIRATION OF BUILDING PERMIT—REVOKING FRONTAGE CONSENTS

(No. 8075—*Deputy, Acting for the Mayor, Department of Buildings—M. H. F.—May 21, 1933—3 pp.*)

When a building permit expires six months after the date of issue because the operations called for in the permit have not been started,

*See also opinions on p. 5.

the applicant is in the position of one making an application for a new permit.

An applicant who must apply for a new permit must replace those frontage consents which have been revoked with others before a new permit may be issued. Property owners who consent to building operations have the right to revoke their consents at any time prior to the issuance of the permit.

Citation:

Ordinance: Code '31: 1181.

REVOCATION OF BUILDING PERMIT

(No. 6744—*Commissioner of Buildings*—R. N. L.—August 7, 1930—3 pp.)

The Building Commissioner cannot revoke a building permit and stop construction of such building merely because the City Council ordered that no such building permits be issued. An issued permit cannot be revoked unless there has been a violation of city ordinances in the erection of said building.

Citations:

Ordinance: Code '22: 404, 406.

Other reference: Op. Corp. Counsel (1916-19), p. 445.

REVOCATION OF PERMIT AFTER BUILDING STARTED— DENYING LICENSE

(No. 7179—*Commissioner of Buildings*—W. L. S.—October 8, 1931—6 pp.)

When the City Council or the proper city officer, in the absence of fraud, grants a permit for the construction of a building, and the party, acting on the good faith of the permit, commences the erection of the building, he acquires something more than a mere license, something in the nature of a vested right, and the permit cannot then be revoked by the city.

Where a store has been established in a residential district in accordance with an ordinance duly enacted by the City Council, the city may not then refuse a license for the operation of such store, even though the authorizing ordinance has been repealed.

Citations:

Cases: Wikstrom v. City of Laramie, 262 Pac. 23 (1928).

People v. Bales, 229 N. Y. Sup. 550 (1928).

City of Buffalo v. Chadeayne, 134 N. Y. 163 (1892).

New York State Investing Co. v. Brady, 214 N. Y. App. Div. 593 (1925).

People v. Thompson, 209 Ill. App. 573 (1918).

LIABILITY OF COMMISSIONER OF BUILDINGS FOR REVOCATION OF BUILDING PERMIT

(No. 6528—Commissioner of Buildings—E. C. H., F. J. C., and J. L.—October 23, 1929—6 pp.)

The Commissioner of Buildings assumes no personal liability for damage caused by revocation of a building permit where the City Council, declaring that the ordinance which permitted its issuance to be invalid and directed him to revoke the permit; any attempt of the City Council to indemnify the commissioner by a bond against liability due to the revocation would be an unlawful exercise of power.

Citations:

Ordinance: Code '22: 400.

REFUND ON BUILDING PERMIT

(No. 6597—H. M. S.—February 4, 1930—1 p.)

The payment of a building permit refund to a person whose name was the only name appearing in connection with the permit on the city's books was proper, and the department was not in any way negligent.

BUILDING PERMIT FOR EXTENSION OF A NON-CONFORMING USE

(No. 7479—Deputy, Acting for the Mayor, Department of Buildings—W. L. S.—March 7, 1932—2½ pp.)

The Department of Buildings may not issue, on an order of the City Council, a permit extending a non-conforming use in an apartment district, since the order is in conflict with the zoning ordinance.

A Council order is not law and cannot set aside the provisions of any ordinance.

PERMIT TO RECONSTRUCT NON-CONFORMING USE

(No. 6422—Commissioner of Buildings—F. J. C.—May 1, 1929—5 pp.)

A permit should be granted for the alteration or reconstruction of a building which is devoted to a non-conforming use and which has been devoted to that non-conforming use continuously since before the passage of the zoning ordinance, provided the cost of alteration

or reconstruction in any ten-year period is not more than fifty per cent of the value of the building.

Citation:

Ordinance: Zoning ord. (1923), sec. 14, par. A.

(3) Nuisance Abatement.

RESTRICTIONS UPON ABATEMENT OF BUILDINGS AS NUISANCES

*(No. 8537—Deputy, Acting for the Mayor, Department of Buildings—
W. L. S.—October 24, 1934—7½ pp.)*

The city has no authority to summarily demolish dilapidated or unsightly buildings without the consent of the owner unless they are imminently dangerous to the public health or safety and even then only in case the existing situation cannot be obviated by less drastic means than the complete destruction of the buildings.

Mere unsightliness of a building which is the usual and natural result of dilapidation does not make it a nuisance and the city would have no authority to declare it a nuisance for that reason alone.

The city has power to abate nuisances only to the extent such abatement is necessary.

If the City Council by ordinance directs the destruction of a building which is not in fact dangerous to the public health or safety, the city would be liable for damages sustained.

Citations:

Ordinances: Code '31: 409, 411, 414, 422, 1702, 2236-37, 2383-2412, 2480.

Cases: *People v. Marquis*, 291 Ill. 129 (1920).

Sings v. City of Joliet, 237 Ill. 300 (1908-09).

Crossman v. Galveston, 112 Tex. 303 (1923).

City of New York v. Dassori, 21 N. Y. App. Div. 348 (1897).

Chicago v. Chicago Stock Yards, 164 Ill. 236 (1896-97).

Other reference: 3 McQuillin, Mun. Corp. (2nd ed.), sec. 939.

OPINION OF FOREGOING SYNOPSIS

This department is today in receipt of a letter concerning a building ordered to be torn down by your department by an ordinance passed by the City Council.

The letter states that the building in question is in perfect condition. "At the same time," he adds, "I am taking this method of informing you that as Corporation Counsel of the City of Chicago, any action taken by the city in pursuance to this ordinance passed will probably involve the city in an injunction and damage suit. For your further information, please be advised that if there are some minor repairs necessary on said building, they will be taken care of. * * *"

We have no means of knowing, of course, whether the building mentioned in the ordinance is in a condition so dangerous to the public safety as would justify the city authorities in summarily demolishing it, but in view of the letter of protest, and in order that the city may not, because of any unwarranted destruction of a building, become involved in this case, or in any case, in litigation difficult, if not impossible, to defend successfully, we feel that we should advise you as to the powers of your department as to the condemnation and demolition of buildings.

The authority of the city in this respect is derived from various grants of power from the state, chief among which are its general powers in regard to buildings, its powers in regard to the promotion of the public health or the suppression of disease, and its power to declare what shall be a nuisance and to abate the same.

Pursuant to statutory authority many enactments as to the destruction of buildings injurious to the public welfare and their abatement as nuisances as well as the duties of the various city officials in reference thereto are found in the Revised Chicago Code of 1931.

We do not deem it necessary to quote the various provisions in regard to the matter, but they may be found upon reference to the following sections of the Revised Chicago Code of 1931: sections 409, 411, 414, 422, 1702, 2236, 2237, 2383 to 2412, and 2480.

While the above ordinances speak for themselves, yet there are certain legal rules applicable of which you should be advised. The right to condemn a building grows out of the right to destroy it because it is a public nuisance, and such nuisance can be abated in no other way.

Generally speaking, anything which is detrimental to health or which threatens danger to persons or property within the city may be regarded and dealt with by the municipal authorities as a nuisance. McQuillin on Municipal Corporations, second edition, Vol. 3, p. 123.

It is well settled that private property may be destroyed to protect the public welfare when such property becomes a nuisance or dangerous to the public health, morals or safety. And if so, it may be summarily destroyed in case of an emergency where such emergency distinctly appears, which is always a condition precedent to the invasion of private property rights, for example, where buildings or other structures become dangerous or to prevent the spread of fire.—McQuillin on Municipal Corporations, second edition, Vol. 3, sec. 939.

In discussing the right of public authorities to summarily destroy private property, our Supreme Court in *People v. Marquis*, 291 Ill., 129, said:

"There are cases in which the summary abatement of nuisances by executive officers without a judicial condemnation, and the destruction of articles used in their maintenance, may be authorized by the legislature. Where the condition of a thing is such that it is imminently dangerous to the safety or offensive to the morals of the community, and is incapable of being put to any lawful use by the owner, it may be treated as a nuisance *per se*. Actual physical destruction is in such cases not only legitimate but sometimes the only legitimate course to be pursued. * * * The power of summary abatement does not extend to property in itself harmless and which may be lawfully used but which is actually put to unlawful use or is otherwise kept in condition contrary to law."

In the case of *Sings v. City of Joliet*, 237 Ill. 300, concerning the summary demolition of a frame building constituting a nuisance, it was con-

tended that before such destruction, the owners were entitled to have a day in court, but in that connection the court said:

"In the exercise of the police power the command 'so use your own property as not to injure others,' and the maxim 'the safety of the people is the supreme law,' are to be observed and given effect (*City of Chicago v. Gunning System*, 214 Ill. 628). If in every emergency the owner of the property, the destruction of which is deemed necessary must be given a hearing, the exercise of the police power would, in many instances, be so delayed that serious injury to public health and other public interests would result. * * *

But in the latter case, however, it will be particularly noted, from a reading of the opinion, that our Supreme Court also held that the power of the city to declare what shall be a nuisance is not an arbitrary one; that the law in Illinois gives no binding effect to the decision of the City Council upon the question of fact as to whether the building was a nuisance, but that the question remained an open one to be adjudicated in that suit; that if the City Council destroys or expressly authorizes the destruction of property, which, in fact, is not a nuisance, the city must be held liable for damages sustained by the owner; that the city was not justified in destroying the building unless the statement of alleged facts contained in the ordinance was true, and then only if the property was so located and in such condition that the danger to public health therefrom could not be obviated by the use of some reasonable measures less drastic than the absolute destruction of the property.

While the general doctrine is recognized that in the case of a public emergency as, for example, buildings imminently dangerous to public safety or public health, presenting a real and controlling exigency before which, of necessity, all private rights must immediately give way, the city may summarily destroy private property to abate or prevent the impending injury, yet it is also well established that the mere unsightliness of a building, which is the usual and natural result of dilapidation, does not make it a nuisance, and a city would have no authority to declare it a nuisance for that reason alone. The power given municipalities to abate nuisances is not an unrestricted power. The abatement must be limited to the necessity of the case, and no wanton or unnecessary injury to the property or rights of individuals must be permitted. While a building may be destroyed, as stated above under certain circumstances, or if erected in violation of a valid ordinance, yet if lawfully erected, it cannot be demolished if the nuisance alleged against it can in any other way, for example, by cleaning, disinfection or repair, be abated. Since it is clear that the owners of a building lawfully erected have a vested property right in the building, it necessarily follows that they have the right to repair the building so as to keep it fit for use.—*Crossman v. Galveston*, 112 Texas 314; *City of New York v. Dassori*, 21 N. Y. App. Div. 348.

We think we should make it plain that, according to recognized legal principles, the city has no authority to summarily demolish dilapidated or unsightly buildings without the consent of the owners unless such buildings are imminently dangerous to the public health or safety and even then only in case the existing situation cannot be obviated by less drastic means than the complete destruction of the buildings.

The city has the power to abate nuisances, but it does not follow that the city may, as the easiest way to abate the nuisance, destroy private property susceptible of use for a lawful purpose.—*City v. Chicago Stock Yards Co.*, 164 Ill. 236. * * *

If the city should fail to abide by the legal principles laid down by courts in cases of this character and should tear down a building which is

not in fact dangerous to the public health or safety, it would be liable for damages notwithstanding the passage of an ordinance by the City Council directing your department to tear down such building.

Opinion No. 7736 of August 31, 1932, to the Commissioner of the Department of Public Welfare is in accord with the above opinion.

COUNCIL ORDINANCE TO WRECK BUILDING*

(No. 6988—*Commissioner of Buildings—R. N.—July 6, 1931—2½ pp.*)

When it is believed necessary that a building be wrecked, it is advisable that City Council pass an ordinance declaring it to be a nuisance.

Citation:

Ordinance: Code '22: 403.

POWER TO DECLARE AND ABATE BUILDINGS AS NUISANCES

(No. 7871—*Division Marshal in Charge of Fire Prevention—W. V. D.—December 31, 1932—2 pp.*)

The city has power to declare and suppress a building as a nuisance if the building was constructed in violation of certain provisions of the building ordinance or was in such unsanitary or dangerous condition as to endanger the health or safety of any person.

Citations:

Ordinances: Code '31: 1702-03, 2480.

Cases: Chicago v. Shaynin, 258 Ill. 69 (1913).

Sings v. City of Joliet, 237 Ill. 300, 311 (1908-09).

NOTICE TO REPAIR BEFORE ABATING NUISANCE

(No. 7115—*Commissioner of Buildings—M. F. M.—September 4, 1931 2 pp.*)

The Commissioner of Buildings must give notice to the owners of unsafe buildings to repair or tear down such buildings and may abate the property only in case of non-compliance with such notice, notwithstanding the City Council declared the property to be a nuisance.

Citations:

Ordinances: Code '31: 409, 410.

Coun. J. (1930-31), p. 880.

*See also opinions, pp. 378, 379, on the wrecking of buildings and opinions, pp. 5, 6, on the wrecking of buildings by the Civil Works Administration.

ABATEMENT BY COMMISSIONER OF BUILDINGS

(No. 6455—*Commissioner of Buildings—F. J. C.—June 19, 1929—7 pp.*)

The Commissioner of Buildings has power to order owners to tear down buildings which have been declared by the City Council to be nuisances, and in cases of immediate danger to life and limb the decisions of the commissioner, predicated upon the order of the City Council, become absolute and final.

Citations:

Ordinances: Coun. J. (1929-30), p. 252.

Code '22: 403, 405, 409.

Statutes: SH '27, 24: 65, 298.

NUISANCE ABATEMENT OF UNSANITARY OR UNSAFE BUILDINGS

(No. 8947—*M. D. S.—November 23, 1935—1½ pp.*)

If a building is unsanitary and structurally dangerous to the extent that it becomes a public nuisance, it should be demolished.

Citations:

Statutes: Code '31: 407, 2234-38, 2383-84.

ABATEMENT OF DEFECTIVE REFRIGERATION

(No. 8990—*Deputy, Acting for the Mayor, Department for the Inspection of Steam Boilers, etc.—J. F. G.—December 27, 1935—2 pp.*)

When a person owning, controlling, or maintaining a defective refrigerating system refuses to obey the orders of the Department for the Inspection of Steam Boilers, etc., to make such changes or repairs as are necessary for the safety of the occupants of the premises where it is located, the department may immediately request the president of the Board of Health that he act pursuant to his power to abate a nuisance.

Citations:

Ordinances: Code '31: 2384, 2386-87, 3456, 3484(a).

ABATEMENT OF NUISANCE INVOLVED IN FORECLOSURE PROCEEDINGS

(No. 7112—*Commissioner of Buildings—E. R. D.—September 3, 1931—3½ pp.*)

Where property of a nuisance character is involved in foreclosure proceedings, notice should be served upon the parties involved and the court petitioned to order an abatement of the nuisance.

Citation:

Ordinance: Code '31: 410.

SERVING NOTICE OF NUISANCE ABATEMENT

(No. 8512—*Mayor's Committee on Substandard Housing—A. F. G.—September 29, 1934—4½ pp.*)

The Board of Health may give notice of the abatement of a nuisance by registered mail where an acknowledgment of the receipt of the notice is taken and preserved as proof of such delivery.

Citations:

Statute:	Cities and Villages act, art. V, pars. 62, 63, 75, 78.
Ordinances:	Code '31: 2236-39.
Administrative rule:	Postal Laws and Regulations (1932), sec. (b).
Cases:	King v. Davenport, 98 Ill. 305 (1880-81). Burdine v. White, 173 Ky. 158 (1917).
Other reference:	Opinion No. 8947 (this volume, p. 389).

RECORDING AND SERVING NOTICE OF NUISANCE ABATEMENT

(No. 8497—*President, Board of Health—A. F. G.—August 31, 1934—4½ pp.*)

A notice to abate a public nuisance caused by unsanitary buildings is an instrument relating to real estate and as such, the original notice, not a duplicate, is entitled to be recorded and when so recorded is notice to subsequent purchasers and creditors.

Notice to abate a public nuisance caused by unsanitary buildings should be served personally upon the owner of the building in question, his agent, or the person in possession, control or charge thereof.

Citations:

Statute:	SH '33, 30: 32.
Ordinances:	Code '31: 2236-37, 2239.
Cases:	Mack v. McIntosh, 181 Ill. 633 (1899). Chicago and Alton R.R. v. Smith, 78 Ill. 96 (1875). Hay v. American Bottle Co., 261 Ill. 362 (1913-14). Haldane v. United States, 69 Fed. 820 (1895).
Other references:	53 CJ 610. 46 CJ 557. Wade, The Law of Notice, sec. 1334.42.

D. GAMBLING AND LOTTERIES

RAISING REVENUE BY LOTTERY

(No. 8424—*C. N.*—June 7, 1935—1 p.)

The raising of revenue by a lottery is specifically prohibited by the State Constitution, and no law providing for such a lottery could be enacted without first amending the Constitution.

Citation:

Constitution: Illinois, art. III, sec. 27.

LOTTERIES BY CITY

(No. 8196—*L. H.*—October 23, 1933—1½ pp.)

The operation of a lottery by the city is prohibited by state law and the use of the United States mails for such purpose is likewise prohibited.

CONSIDERATION AS ATTRIBUTE OF LOTTERY

(No. 7624—*Commissioner of Police—C. J. A.*—June 27, 1932—2½ pp.)

In order for a scheme to constitute a lottery, it is necessary that a consideration of some kind pass from the participant to the proprietor. Tickets or prizes which are distributed free to anyone who desires them do not constitute a lottery.

Citations:

Cases: Thomas v. People, 59 Ill. 160 (1871).

Dunn v. People, 40 Ill. 465 (1863-1866).

Elder v. Chapman, 176 Ill. 150 (1898).

Yellowstone Kit v. State of Alabama, 7 L. R. A. 599 (1890).

Other references: 38 CJ 291.

Bishop, Statutory Crimes, sec. 952.

CASH AWARDS NOT INVOLVING CHANCE

(No. 6800—*Mayor*—November 17, 1930—*J. W. B., E. C. H., J. G. D., S. L. G., J. L. and M. H. F.*—2½ pp.)

A "prosperity drive" plan which consists of giving cash awards according to a definite standard and without any element of chance, is not a lottery and is otherwise lawful.

Citation:

Statute: Cah. '29, 38: 180.

CAPACITY OF DEVICE FOR GAMBLING

(No. 7048—*Captain 32nd District—E. Broz.—August 3, 1931—2 pp.*)

If a machine which is operated for vending purposes, is so constructed as to permit its use as a gambling instrument, it may be suppressed as a gambling implement under the broad provisions of the ordinance.

Citation:

Ordinance: Code '31: 1573.

DESTRUCTION OF GAMBLING DEVICES

(No. 7390—*Commissioner of Police—C. J. A.—December 17, 1931—6½ pp.*)

Gambling devices are subject to seizure and destruction regardless of whether they are actually used for gambling.

Gambling devices are beyond the protection of the law.

Gambling devices, which are such in fact, are not lawful subjects of property and belong to nobody. Therefore, nobody has any right to complain about whatever disposition is made of those devices by the Department of Police. However, if there is any question about the nature of the devices, and if it is possible that they constitute property which may be used for some legitimate purpose, the Commissioner of Police should obtain a court order before he undertakes to destroy the devices.

Citations:

Statute: Criminal Code, art. VIII.

Cases: Frost v. People, 193 Ill. 635 (1901).

Bebel v. People, 173 Ill. 9 (1898).

Glennon v. Britain, 155 Ill. 232 (1895).

Price v. Burns, 101 Ill. App. 418 (1902).

People v. Leach, 143 Ill. App. 442 (1909).

EFFECT OF INJUNCTION ON ABATEMENT OF GAMBLING DEVICES

(No. 7926—*State's Attorney—O. F. W. and W. V. D.—February 2, 1933—1 p.*)

An injunction does not restrain the law enforcing agencies from proceeding against any operator of a machine or device where the same is in fact used for gambling purposes.

CHANCE INDUCEMENTS

(No. 7700—*Commissioner of Police—C. J. A.—August 8, 1932—2½ pp.*)

Any scheme or device where the amount that customers receive for their money is determined by chance constitutes a lottery and is unlawful.

Even though all customers of a certain machine get their money's worth, it is still a gambling device wherever a prize or premium is held out as an additional inducement which "lucky" customers will receive, and those less lucky will not.

Chance is the outstanding feature of the Iron Claw Vending Machine in distributing additional prizes and therefore it is an illegal gambling device.

Citations:

- Cases: Thomas v. People, 59 Ill. 160 (1871).
Dunn v. People, 40 Ill. 465 (1863-66).
Horner v. United States, 147 U. S. 449 (1892).

RAFFLES AS LOTTERY

(No. 8316—*A. F. G.—February 23, 1934—1½ pp.*)

Since the raffling of cars to finance a round-the-world flight is a lottery, it is prohibited by the law of Illinois.

Citations:

- Constitution: Illinois, art. IV, sec. 27.
Statutes: SH '31, 38: 406-411.
Ordinance: Code '31: 4185.
Case: Dunn v. People, 40 Ill. 465 (1863-66).

USE OF PREMISES FOR GAMBLING

(No. 7106—*Mayor—J. F. G.—September 1, 1931—1½ pp.*)

To convict a person for the use of his premises for gambling, the knowledge of the owner of the premises is a necessary element and such knowledge can be brought to the owner only by notice.

Citations:

- Ordinance: Code '31: 4177.
Statute: Illinois Criminal Code, sec. 306.

FREE CHANCES FOR PRIZES WITH PURCHASES

(No. 8958—*Commissioner of Police—W. V. D.—December 10, 1935—2½ pp.*)

An enterprise for stimulating business which consists of giving a ticket to each customer for each purchase, the ticket entitling the

customer to participate in a drawing for prizes in merchandise and cash, is illegal, as it constitutes a lottery.

Citations:

Constitution: Illinois, art. III, sec. 27.

Statute: ISBS '35, 38: 401.

Horner v. United States, 147 U. S. 449 (1893).

Loveland v. Bode, 214 Ill. App. 399 (1920).

Thomas v. People, 59 Ill. 160 (1871).

Opinions No. 7010 of July 14, 1931 and No. 7701 of August 8, 1932, both to the Commissioner of Police, are in accord with the above opinion.

LOTTERY IN CONNECTION WITH PURCHASES

(No. 6817—Acting Commissioner of Police—R. N. L.—December 22, 1930—3 pp.)

The mere fact that value is given for a purchase does not alter its character as a lottery when the purchase involves a gambling device whereby additional property is given away.

Citations:

Statute: SH '29, 38: 406 (Criminal Code, sec. 180).

Case: Almy Manufacturing Co. v. Chicago, 202 Ill. App. 240, 246 (1917).

DISTRIBUTION OF PRIZES BY STORE OWNERS

(No. 7765—C. J. A.—October 10, 1932—18 pp.)

If automobiles or other articles are actually given away and nothing whatever is paid for them by the recipient directly or indirectly as by the purchase of goods or otherwise, there is no violation of any law.

If automobiles or other articles are distributed by chance as prizes only to customers who pay a consideration for the chance, the transaction is a lottery, violating both the state and federal laws.

The three elements of a lottery are consideration, prize and chance.

Citations:

Constitution: Illinois, art. IV, sec. 27.

Statutes: SH '31, 38: 406-411.

Cases: Meyer v. State, 112 Ga. 20, 51 L. R. A. 496 (1900).

State v. Shorts, 32 N. J. Eq. 398 (1880).

State v. Lipkin, 169 N. C. 265, 84 S. E. 340 (1915).

Eastman v. Armstrong-Byrd Music Co., 212 Fed. 662 (1914).

Horner v. United States, 147 U. S. 449 (1892).

Thomas v. People, 59 Ill. 160 (1871).

Dunn v. People 40 Ill. 465 (1863-66).

Ract v. Van Deman, 240 U. S. 342, 364 (1915).

People v. Lavin, 179 N. Y. 164 (1904).

Other references: 38 CJ 291.

17 Ruling Case Law 1222.

Bishop, Statutory Crimes, sec. 952.

ISSUE OF CHANCES IN CONNECTION WITH AUTO SALES

(No. 8720—W. V. D.—March 16, 1935—4 pp.)

A plan, whereby for each \$100 paid on a used car purchased, a ticket is issued for a chance on receiving a new car in a weekly drawing, constitutes a lottery and is a violation of the law.

Citations:

Statute: SH '33, 38: 406.

Cases: Thomas v. People, 59 Ill. 160 (1871).
Dunn v. People, 40 Ill. 465 (1863-66).
Horner v. United States, 147 U. S. 449 (1893).
Elde v. Chapman, 176 Ill. 150 (1898).
Loveland v. Bode, 214 Ill. App. 399 (1920).
Davenport v. Ottawa, 54 Kan. 711 (1895).

BENEFIT GAMES FOR PRIZES

(No. 6721—J. N. K.—July 17, 1930—2 pp.)

The conducting of benefit bunco games, in which prizes are given, is illegal.

A chartered club should not be interfered with by police unless they take action under due process of law.

Citation:

Statute: Cah. '29, 38: 401.

CANDY ON CHANCE BASIS AS LOTTERY

(No. 6576—Commissioner of Police—J. N. K.—December 31, 1929—5 pp.)

A scheme to induce children to buy penny candy on the chance of receiving free candy of greater value constitutes a lottery and is illegal.

Citations:

Statutes: Cah. '29, 38: 401 (Lotteries).

Cases: Dunn v. People, 40 Ill. 467 (1863, 1866).
Thomas v. People, 59 Ill. 160 (1871).
Alma Manufacturing Co. v. Chicago, 202 Ill. 240 (1903).

PENNY-DICE MACHINE

(No. 7987—*Commissioner of Police—W. V. D.—March 31, 1933—4 pp.*)

A machine which on the deposit of a penny allows the player by mechanical means to throw dice for merchandise, is a gambling device, as the player's score depends upon chance.

Citations:

Statutes: SH '31, 38: 341.

Ordinances: Code '31: 4180, 4183.

Cases: Hay v. Reid, 85 Mich. 304 (1891).
Moberly v. Deskin, 169 Mo. App. 768 (1912-13).
Lang v. Merwin, 78 Me. 786 (1886).
Thomas v. People, 59 Ill. 160 (1871).

PENNY GUN MACHINE WITH JACK-POT

(No. 7298—*Commissioner of Police—C. A. A.—November 16, 1931—6 pp.*)

A penny machine which vends sticks of gum but which, at same time, has a jack-pot that pays out on the basis of chance, constitutes a gambling device and is forbidden by statute.

Citations:

Statutes: Criminal Code, sec. 126.

SH '29, 38: 343.

Cases: Thomas v. People, 59 Ill. 160 (1871).
People v. Lavin, 179 N. Y. 164, 170, 71 N. E. 755 (1904).
Dunn v. People, 40 Ill. 465 (1863-66).
Elder v. Chapman, 176 Ill. 150 (1898).
Lynch v. Rosenthal, 144 Ind. 86 (1895).
Davenport v. Ottawa, 54 Kan. 711 (1895).
Burks v. Harris, 23 L. R. A. (N. S.) 626 (Ark., 1909).

KENO ESTABLISHMENTS

(No. 7804—*E. R. D.—November 10, 1932—2 pp.*)

Any establishment, building or enclosure which houses a game that involves the payment of money by the player for a Keno card and the giving of a prize to the winner is a public nuisance.

Citations:

Ordinances: Code '31: 4177-78.

PRICE OF CANDY DETERMINED BY CHANCE

(No. 6471—Commissioner of Police—J. N. K.—July 16, 1929—3 pp.)

A game which involves the selection of candy, the price of which is determined by chance, is gambling and violates both a statute of the state and an ordinance of the city.

Citations:

Ordinance: Code '22: 1567.

Statute: Cah. '27, 38: 298 (Criminal Code).

Opinions No. 7793 of October 25, 1932, No. 7418 of January 15, 1932, No. 7697 of August 8, 1932, and No. 6964 of June 19, 1931, also deal with the subject of gambling.

Games of Skill: Injunctions to restrain the city from interfering with the use of pin games were denied on the ground that such pin and marble devices are gambling devices and not "tests of skill."—Cook County Circuit Court, Dec. 13, 1935.

E. LIQUOR REGULATION***AMENDMENT OF THE VOLSTEAD ACT**

(No. 7840—Mayor—L. H.—December 15, 1932—4½ pp.)

The Volstead act may be amended so as to permit the manufacture, sale and transportation of beverages which contain more than one-half of one per cent of alcohol, but not so as to permit the sale of these beverages with an alcoholic content large enough to make them actually intoxicating.

Citations:

Constitution: United States, amendment XVIII.

Case: Commonwealth v. Louisville and Nashville R. R., 140 Ky. 21 (1910).

**DEFINITION OF INTOXICATING LIQUORS UNDER
18TH AMENDMENT**

(No. 7847—Mayor—L. H.—December 21, 1932—3½ pp.)

Since Congress is not compelled to make a definition of "intoxicating liquors," the use of the words in any act passed by Congress pursuant to the eighteenth amendment probably is not subject to attack if the definition happens to place the alcoholic content too high. If

*See also pp. 482-500 on liquor licenses.

Congress places the alcoholic content too low in its definition of "intoxicating liquors," the person who is prosecuted and whose liberty or property is at stake has the right to question the constitutionality of that law.

Should a way be found to raise the question, it is problematical as to what the courts would say if Congress defined "intoxicating liquors" as liquors containing more than fifteen per cent of alcohol.

Citations:

Constitution: United States, amendment XVIII.

Case: Heitler v. United States, 280 Fed. 703 (1922).

Other reference: Opinion No. 7840 (this volume, p. 396).

LIQUOR TRAFFIC REGULATION

(No. 7975—*Commissioner of Police—L. H.—March 21, 1933—3 pp.*)

The repeal of the Illinois Prohibition act would wipe out all state laws for the control of the liquor traffic and place the enforcement of the liquor laws entirely within the control of the federal government. The Police Department should co-operate with the federal officers in enforcing the federal liquor laws.

Citations:

Cases: People v. Williams, 309 Ill. 492 (1924).

People v. Alfano, 322 Ill. 384 (1927).

Plisner v. Chicago, 318 Ill. 131 (1925).

RETAIL SALES OF 3.2 BEER AFTER CLOSING HOURS

(No. 8620—*Commissioner of Police—M. H. F.—January 10, 1935—3 pp.*)

The sale of 3.2 beer after closing hours violates the city's retail liquor dealer's ordinance, since 3.2 beer is "alcoholic liquor" within the meaning of the State Liquor Control act and the City Council has been given the power to restrict the permissible hours for the sale of this liquor.

Citations:

Statutes: SH '31, 43: 1.

Ill. Laws (Sp. sess., 1933-34), pp. 58, 60, 64, 67 (Liquor Control act, art. I, sec. 2; art. II, sec. 1; art. IV, sec. 1; art. VI, sec. 10).

Ordinance: Coun. J. (1933-34), p. 1542 (Retail liquor dealer's ord., sec. 3143-O, 3143-P).

LIQUOR SALES IN CITY-OWNED PROPERTY

(No. 8932—*M. H. F.*—November 18, 1935—1½ pp.)

The state liquor law which provides that no alcoholic liquor be sold or delivered in any building that belongs to or that is under the control of the state or its political subdivisions is not limited in its effect to those buildings that are being used for governmental purposes.

City-owned property, land and buildings, which has been leased to tenants who are given exclusive control over the property, is not to be considered "under the control of or belonging to" the city for the term of the lease where the buildings are separated from all municipal activity and liquor may be sold there for the term of the lease.

Citation:

Statute: SH '35, 43: 130.

**LIQUOR SALES IN CITY BUILDING LEASED FOR
RESTAURANT**

(No. 8856—*Comptroller—M. H. F.*—August 26, 1935—1½ pp.)

The sale of alcoholic liquor is not prohibited in a city-owned building leased by the tenants for restaurant purposes.

Citations:

Statutes: Ill. Laws (Sp. sess. 1933-34), p. 71 (Liquor Control act, art. VI, sec. 11).

Opinion No. 8852 of August 19, 1935, to the Comptroller is in accord with the above opinion.

**COMPTROLLER'S POWER OVER LIQUOR SALES
ON NAVY PIER**

(No. 8811—*City Comptroller—R. D. K.*—July 11, 1935—2 pp.)

The Comptroller cannot allow a lessee on Navy Pier to sell alcoholic liquor as the power to license the sale of liquor is in the Mayor, nor can alcoholic liquor be sold in any building belonging to, or under the control of the city.

Citation:

Statute: Ill. Laws (Sp. sess. 1933-34), pp. 71, 90 (Liquor Control act, art. VI, sec. 11; art. X, sec. 1).

LIQUOR SALE NEAR ARMORY

(No. 8641—*Deputy Liquor Control Commissioner—M. H. F.*—January 23, 1935—1½ pp.)

The armories of the Illinois National Guard and Naval Militia which are located within the city, are not "military or naval stations" within

the meaning of the State Liquor Control law prohibiting the sale of alcoholic liquor within a hundred feet of these stations.

Citations:

Statute: Ill. Laws (Sp. sess., 1933-34), p. 71.

Other reference: Century Dictionary, "military station," "naval station," "armory."

"DRY" DISTRICTS BY REFERENDUM

(No. 8300—*City Council*—J. F. G.—February 15, 1934—6½ pp.)

Any precinct or group of precincts of the city comprising an area of which no two points are more than a mile apart may become "dry" by a vote of the people. The question must be submitted to the people upon a petition of twenty-five per cent of the legal voters of such precinct or group of precincts.

Citations:

Constitution: United States, amendment XVIII.

Statutes: Ill. Laws (2nd sp. sess., 1934), p. 64 (Alcoholic liquors).

Act for Incorporation of Northwestern University, Feb. 14, 1855, sec. 11.

Cases: *People v. Williams*, 309 Ill. 492 (1924).

People v. Alfano, 322 Ill. 384 (1927).

National Prohibition Cases, 253 U. S. 350 (1920).

City of Litchfield v. Thorworth, 337 Ill. 469, 474 (1930).

CLOSING OF LIQUOR ESTABLISHMENTS IN DRY DISTRICT

(No. 8579—*Commissioner of Police*—M. H. F.—December 4, 1934—1½ pp.)

Retail liquor establishments operating under a license for the current license period in precincts which have voted dry cannot be forced to close until thirty days after the date that the vote was taken.

Citations:

Statutes: Ill. Laws (Sp. sess., 1933-34), p. 82 (Liquor Control act, art. IX, sec. 16).

LIQUOR ORDERS BY DRUGGIST IN DRY TERRITORY

(No. 8511—M. H. F.—September 29, 1934—1½ pp.)

The proprietor of a drug store in dry territory is not privileged to solicit or receive orders for alcoholic liquor at such store.

Citation:

Statute: Ill. Laws (Sp. sess., 1933-34), pp. 59, 88 (Liquor Control act, art. I, sec. 2, cl. 15; art. IX, secs. 11-13).

CLEAR VIEW FROM STREETS INTO LIQUOR PREMISES

(No. 8463—*M. H. F.*—*July 11, 1934*—1½ pp.)

Restaurants, clubs, and hotels are specifically exempted from the provisions of the State Liquor Control law which prohibits the use of screens preventing a clear view from the street into the interior of the licensed premises. An operator of such a place, therefore, would not be required by law to remove paint from the windows.

Citation:

Statute: Ill. Laws (Sp. sess., 1933-34), p. 74 (Liquor Control act, sec. 20).

ADVERTISING OF SALOONS OR BARS

(No. 8303—*J. F. G.*—*February 17, 1934*—1½ pp.)

Section 22 of article VI of the 1934 Act Relating to Alcoholic Liquors should be construed to mean that no place may be advertised as a saloon or bar where alcoholic liquor is manufactured or sold at wholesale or retail under any state or local license.

Citation:

Statute: Ill. Laws (2nd. sp. sess., 1934), p. 74, sec. 22.

SALES OF NEAR BEER ON ELECTION DAY

(No. 8083—*Alderman 46th Ward—L. H.*—*June 2, 1933*—2 pp.)

The statute regulating the closing of liquor dispensing places on election days is still in force despite the repeal of the State Prohibition act, and applies to places selling beer containing 3.2 per cent or less of alcohol as well as to regular saloons, bars, taverns, and the like.

Citations:

Statute: General Election act, sec. 79.

Cases: *Chicago v. Murphy*, 313 Ill. 98 (1925).

Chicago v. Efantis, 339 Ill. 55 (1930).

FREE FOOD IN DRAMSHOPS

(No. 8440—*City Collector—M. H. F.*—*June 25, 1934*—1½ pp.)

The ordinance of June 11, 1917, prohibiting the giving away of food without charge in dramshops is no longer in effect.

Citations:

Ordinance: Coun. J. (1917-18), p. 543.

Case: *Fish. v. Walsh*, 323 Ill. 359 (1927).

LIQUOR SALES AT WHITE SOX BALL PARK—SERVING LIQUOR AT COUNTERS IN RESTAURANTS

(No. 8304—J. F. G.—February 17, 1934—1½ pp.)

Subparagraph one of section 12 of article III of "An Act Relating to Alcoholic Liquors," was intended to apply to A Century of Progress Exposition and not to Comiskey White Sox ball park.

Only service bars are permitted for the purpose of mixing and preparing drinks to be consumed at tables, except in the case of restaurants where the serving of meals is at all times the principal business. In these restaurants, drinks may be served at counters.

Citations:

Statutes: Ill. Laws (2nd. sp. sess., 1934), p. 63, sec. 12 (1).
Id., p. 74, sec. 21 (a).

F. WEIGHTS AND MEASURES

FEES FOR INSPECTING WEIGHTS AND MEASURES—SALE OF BEER IN CONTAINERS

(No. 8160—City Sealer—M. H. F.—August 31, 1933—4½ pp.)

The City Sealer has power to charge inspection fees for inspecting measures or standards of comparison used in determining the quantity of goods sold but not for the inspection of each container used in the merchandising of a commodity unless no measuring device was used to fill the container and the container itself was used as a standard of measure in merchandising.

The City Council in regulating the sale of beer in the city could, by ordinance, restrict the sale of beer in barrels or kegs to such sale in containers of capacities prescribed by statute.

Citations:

Statutes: SH '33, 24: 55, 56.

Id., 147: 16, 36.

Ordinance: Code '31: 532, 533, 535, 2929.

Other references: Webster's Dictionary, "measure."
Century Dictionary, "measure."

OPINION OF FOREGOING SYNOPSIS

By your communication of August 28th you request our opinion as to whether or not, under section 2929 of the Weights and Measures ordinance, your department has authority to test all beer barrels and kegs used in the delivery of beer in the City of Chicago, making a charge therefor at the rate of 15 cents each. You state that you believe these containers are used as measuring packages.

* * * * *

The power of the city to enact the Weights and Measures ordinance is derived from the following sections of article V of the Cities and Villages

act (Chap. 24, Smith's Ill. Rev. Stat., 1933) which vests express authority in the City Council:

"Sec. 55. To provide for the inspection and sealing of weights and measures.

"Sec. 56. To enforce the keeping and use of proper weights and measures by vendors."

While we believe you have authority under the law to inspect measures used by Chicago manufacturers of beer, and authority to collect reasonable inspection fees exacted by ordinance, we doubt that you have authority to treat every barrel or keg used by such brewers in their business as a measure.

Webster defines the noun "measure" as follows:

"An instrument, as a yardstick, a graduated tape, a vessel of known capacity, or the like, for measuring dimensions or volume. * * * A unit of measurement, especially a unit of length, area or volume,—* * *. Hence, any standard with reference to which something is valued or estimated; a criterion; gauge; * * * a rule or standard of judgment."

The Century Dictionary defines the term as follows:

"A unit or standard adopted to determine the linear dimensions, volume, or other quantity of other objects, by the comparison of them with it; a standard for the determination of a unit of reckoning. Hence, any standard of comparison, estimation, or judgment."

These definitions fortify our opinion that the authority given you by the ordinance is limited to the power to collect inspection fees for inspecting measures or standards of comparison used by the brewers in determining the quantity or volume of beer sold by them but does not authorize the making of an inspection charge for the inspection of each container used in the merchandising of the commodity. If Chicago brewers do not keep and use proper measures or standards for the determination of their reckoning the city could doubtless compel such keeping and use. Furthermore, if beer sold by the barrel, which barrel is required by state law to contain thirty-one and one-half gallons (Smith's Stat. 1933, chap. 147, sec. 31), is found short in quantity, the sellers thereof could doubtless be prosecuted under both the state law and municipal ordinances. Also, we believe that the City Council in regulating the sale of beer in Chicago could, by ordinance, restrict the sale of beer in barrels or kegs to sales in containers of prescribed capacities. While we doubt that the courts would uphold your action in forcing the inspection of each beer barrel or beer keg used by a brewer and in exacting an inspection charge therefor, if any brewer does not use a meter pump or gauge or other liquid measuring device in the process of filling his containers and bill his customers for the actual quantity of beer sold, but in lieu thereof does use a barrel or keg as his standard of measure in the sale of his product, then we believe it would be within your province to inspect and seal each and every such barrel or keg so used and charge therefor the usual inspection fee prescribed by ordinance for the inspection of a liquid measure of that capacity.

Section 535 of the Revised Chicago Code of 1931 fixes the fee for inspection and sealing of each liquid measure of the capacity of one gallon and upwards at 15 cents, so we assume that this would be the fee to be charged for the inspection of a beer barrel or keg.

Section 533 of the Code prohibits you from making a charge for inspecting a liquid measuring device more than once in every six months, unless such measure shall be found to be nonconformable to standard.

Section 16 of the State Weights and Measures act (Chap. 147, Smith's Stat. 1933) authorizes the Director of Trade and Commerce, his representa-

tives, and the city inspectors of weights and measures to seize and hold for use as evidence in any action brought under the statute of this state, or under any ordinances of a municipality, any short measure or other instrument used for measuring, same to be released to the owner thereof if no suit is commenced against such owner within fifteen days of such seizure. Section 532 of the city's code also covers the matter of the condemnation and seizure by city inspectors of measures found not to be conformable to state standard.

Inasmuch as we have no means of determining whether Chicago brewers use barrels or kegs for measuring purposes we cannot go further than to say that if they are used for such purposes they can be inspected the same as other measuring devices and the inspection fee charged therefor, but if the barrels or kegs are used as containers merely and the measuring of the liquids is accomplished through other means you would have no authority to treat these containers as measuring devices.

REGULATION OF RETAIL SALE AND WEIGHT OF POULTRY AND MEAT—VALID DISTINCTIONS IN REGULATING WEIGHTS

(No. 7876—*Chairman, Committee on Judiciary and State Legislation—*
M. H. F.—January 3, 1933—7½ pp.)

The city has the power to pass an ordinance requiring retail sales of poultry and meats to be made by avoirdupois weight; the exemption of canned glass jar and package products which have the net avoirdupois weight stamped on the container thereof is reasonable and valid.

The limitation of the ordinance to retail sales only is justified by the lack of danger of short weight when sales at wholesale are involved.

The city has the power to regulate the sale of poultry meats and non-liquid animal products and the business of a person engaged in such sales.

Citations:

Statutes: SH '31, 24: 65.49 (Cities and Villages act, sec. 50).
Id., 147: 44.

Ordinance: Code '31: 2933.

Cases: Chicago v. Arbuckle Bros., 344 Ill. 597 (1931).
Crackerjack Co. v. Chicago, 330 Ill. 320 (1928).
People v. Andrews, 339 Ill. 157 (1930).
People v. Thompson, 341 Ill. 166 (1931).
Ruban v. Chicago, 330 Ill. 97 (1928).
Moy v. Chicago, 309 Ill. 242, 247 (1924).
People v. Schenck, 257 Ill. 384 (1912-13).
McGrath v. Chicago, 309 Ill. 515 (1924).
Ozan Lumber Co. v. Union County Bank, 207 U. S. 251 (1907).
Metropolis Theater v. Chicago, 228 U. S. 61 (1913).
Zucht v. King, 260 U. S. 174, 177 (1922).
Stewart v. Brady, 300 Ill. 425 (1922).
People v. Chicago, 337 Ill. 100 (1930).

(The original opinion of the foregoing synopsis is reproduced on the following pages.)

OPINION OF FOREGOING SYNOPSIS

You have asked our opinion regarding the constitutionality of a proposed ordinance amending section 2933 of the Revised Chicago Code of 1931, relative to the requirements for the sale of poultry products, etc., by avoirdupois weight. This ordinance reads as follows:

"Be It Ordained by the City Council of the City of Chicago:

"Section 1. That section 2933 of the Revised Chicago Code of 1931 be and the same is hereby amended by striking out the words 'meats and non-liquid animal products' as the same appear in the third and fourth lines of said section, as printed in the official edition of said code, and by adding to the first paragraph of said section, as printed, the following:

"All dressed and live poultry and poultry products, meats and non-liquid animal products, except eggs, sold or offered for sale at retail within the City of Chicago for delivery within the said city, shall, in the absence of a contract or agreement in writing to the contrary signed by the parties thereto, be sold by standard avoirdupois net weight; provided, however, that canned, glass jar or package goods which have the net avoirdupois weight printed or stamped thereon shall not be included within the provisions of this ordinance.

"Section 2. This ordinance shall be in force and effect from and after its passage and publication."

It is our opinion that the ordinance, as redrafted, is constitutional and would be so held by the courts. By section 50 of article V of the Cities and Villages act (Chap. 24, Smith's Ill. Rev. Stat., 1931, p. 348) the legislature delegated to cities in Illinois express power "to regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same and to control the location thereof." The Supreme Court of Illinois having held that the term "provisions" embraces the articles mentioned in the ordinance, we believe that the city has the right to regulate the sale of the products mentioned and the business of persons engaged in such sale. (City of Chicago v. Arbuckle Bros., 344 Ill. 597; Crackerjack Co. v. City of Chicago, 330 Ill. 320.) By an act to extend the powers of the City Council in cities, etc., approved June 15, 1909, sec. 44, chap. 147, Smith's Ill. Rev. Stat., 1931, p. 2925, authority has been conferred to require the products mentioned to be sold by avoirdupois weight in the absence of a contract or agreement in writing to the contrary. * * * It is therefore thought that the above quoted sources of authority establish the power of the City of Chicago to pass an ordinance similar to the one under consideration requiring sales to be made by avoirdupois weight. The exemption of canned, glass jar and package goods appears to be justified by the fact that when the net avoirdupois weight is stamped or printed on their containers the purchaser is thereby protected.

Considering that portion of the amendment which limits the regulations to sales at retail, it is believed that this limitation will not subject the ordinance to successful attack in the courts on the ground of discrimination. Recognizing a special danger in retail sales, and it being the intention of the municipal legislative body to protect the housewife and member of the general public buying the products named at retail sales, no sufficient reason is seen by us why the City Council may not legislate regarding retail sales only and still enact a valid ordinance.

While an ordinance must be general in character and must operate equally upon all persons of the same class (People ex rel. Russell v. Andrews, 339 Ill. 157), the sole limitation upon a City Council with reference to the passage of local or special laws is that an ordinance should be reasonable.—(People ex rel. Johns v. Thompson, 341 Ill. 166.) If there is a reasonable

connection between any business or occupation and peril to the public, a reasonable ground for regulation is presented. (*Ruban v. City of Chicago*, 330 Ill. 97.) The judicial view is that much should be left to the municipal authorities. If the City Council should consider that danger to the public lurks in the sales at retail of the products mentioned in the ordinance, which danger does not exist in sales at wholesale, or that a greater danger exists in retail than in wholesale transactions, as we view the law, it is proper for the Council to enact the ordinance under consideration, which is limited in its scope to sales at retail. The power of the City Council to classify persons or objects for the purpose of legislation or control and to pass laws applicable only to such persons or objects has been sustained by numerous decisions of the Supreme Court of Illinois, where the classification is based on some substantial difference which bears a proper relation to the classification.—(*Moy v. City of Chicago*, 309 Ill. 242, 247; *People v. Schenck*, 257 id. 384.) The making of such a classification is primarily a legislative question for the City Council, and it can become a judicial question only when the action of the law making body is clearly unreasonable, arbitrary and discriminatory. Before a court can interfere with the legislative judgment it must be able to say that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.—(*McGrath v. City of Chicago*, 309 Ill. 515, 517.) It is not possible, nor is it necessary, in a classification for governmental purposes that there be an exact exclusion or inclusion of persons or things.—(*McGrath v. City of Chicago*, *supra*; *Ozan Lumber Co. v. Union County Bank*, 207 U. S. 251.) The Supreme Court of the United States, in the case of *Metropolis Theater v. City of Chicago*, 228 U. S. 61, affirmed the decision of the Supreme Court of Illinois, reported in 246 Ill. 20. * * *

And in *Zucht v. King*, 260 U. S. 174, 177, the same court said:

“A long line of decisions by this court had also settled that, in the exercise of the police power, reasonable classification may be freely applied, and that regulation is not violative of the equal protection clause merely because it is not all-embracing.”

In *Stewart v. Brady*, 300 Ill. 425, the court held that classification of the objects of legislation is not required to be scientific, logical or consistent if it is reasonably adapted to secure the purpose for which it is intended and is not purely arbitrary, and the classification need not be so broad as to include all the evils which might possibly be brought within its terms. It further held that a legislative classification cannot be disturbed by the courts unless they can see clearly that there is no fair reason for the application of the law to the particular individuals while others of the same class are excluded. Dealing with particular exigencies, the legislature may be guided by experience. It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest. If an evil is specially experienced in a particular branch of business it is not necessary that the prohibition should be couched in all-embracing terms. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. See also *People v. City of Chicago*, 337 Ill. 100, in which the court held that if a classification is based on a substantial and reasonable distinction in the situation and circumstances of the individuals who are embraced therein from those not so included, the law is valid.

So, with the above mentioned authorities in mind, we are of opinion that the courts would not disturb the discretion exercised by the City Council if it were to pass the ordinance under review and legislate only as to sales at retail, in which sales the Council thought the short-weight evil was more likely to occur. The apparent unlikelihood of the public being confused and short-weighted in sales at wholesale of the products mentioned in

the ordinance and likewise the apparent possibility of short-weighting when making sales at retail present, we believe, a fair reason for the law in the case of retailers which does not require its extension to wholesalers, whom it leaves untouched. The ordinance will operate equally upon all those composing the class of persons, firms and corporations selling poultry, meats, etc., at retail, and, as said before, the apparently substantial distinctions and differences in conditions between sales at wholesale and sales at retail, in our opinion, would be sufficient to sustain the proposed ordinance.

SEIZURE OF SCALES WHEN FAULTY AND UNSEALED— COLLECTION OF INSPECTION FEES

(No. 8441—*Inspector of Weights and Measures—M. H. F.—June 26, 1934—4 pp.*)

The Inspector of Weights and Measures has authority to seize scales which are false, unsealed, or do not conform to state standards, but this authority does not extend to the seizure of scales already inspected and sealed for which the fees have not been paid. In order to collect these fees, the inspector should either institute prosecutions under the code or sue for unpaid fees.

The Inspector of Weights and Measures may demand payment of the inspection fee before sealing a scale.

Citation:

Ordinance: Code '31: 528, 530, 532, 535, 2929, 2941-44.

WEIGHT REGULATION OF PACKAGE GOODS

(No. 7625—*City Sealer—R. N.—June 28, 1932—1½ pp.*)

There is no ordinance which requires package goods to be packed in stipulated quantities.

Misrepresentation arises where packages weighing less than a pound are actually sold for pound packages. That, however, is a state offense and is not a violation of any city ordinance.

REGULATION OF WEIGHT OF BREAD

(No. 6846—*M. H. F.—March 12, 1931—2½ pp.*)

The selling or offering for sale in the city of any loaves of bread which are not made in the sizes or weights prescribed by ordinance is illegal.

Citations:

Ordinance: Code '22: 316.

Cases: Chicago v. Schmidinger, 243 Ill. 167 (1909-10).
Schmidinger v. Chicago, 226 U. S. 578 (1913).

REGULATION OF WEIGHT OF TWIN BREAD LOAVES

(No. 8673—*City Sealer*—*M. H. F.*—*February 15, 1935*—3 pp.)

The wrapper of a one-pound twin loaf of bread should indicate the name and address of the manufacturer and the fact that the net weight of the package is one pound and the net weight of each loaf is eight ounces.

Citations:

Statute: SH '33, 147: 21.

Ordinance: Code '31: 2990, as amended.

Cases: Chicago v. Schmidinger, 243 Ill. 167 (1909-10).

Chicago v. Drogasawacz, 256 Ill. 34 (1912-13).

SALE OF POULTRY OR MEAT BY PIECE OR WEIGHT

(No. 6777—*Inspector of Weights and Measures*—*C. J. A.*—*September 26, 1930*—4½ pp.)

A chicken or other whole animal may be sold by the "piece" or numerical count provided no misrepresentations are made as to the weight of the chicken, but the selling price of hams or of other fractional parts of an animal must inform the customer of the standard avoirdupois weight of the hams, or other fractional parts, in the absence of a written agreement to the contrary.

Citations:

Statute: SH '29, 147: 21.

Ordinance: Code '22: 4182.

USE OF CORRUGATED LIQUID MEASURES

(No. 7523—*City Sealer*—*Jud. G.*—*March 31, 1932*—1½ pp.)

The use of a corrugated liquid measure in which the corrugations run vertically is legal, even for the purpose of measuring heavy oils.

Citation:

Administrative rule: Department of Trade and Commerce, Regulations, sec. 4.

METERING AND INSPECTION OF FUEL OIL DELIVERY TRUCKS

(No. 8773—*Inspector of Weights and Measures—M. H. F.—May 21, 1935—6½ pp.*)

The city has authority to require the sellers of fuel oil to place meters on their delivery trucks and pay a small inspection fee.

Citations:

Statutes: SH '33, 24: 65.53-65.55, 65.65, 65.102.

Id., 147: 12.

Ordinance: Code '31: 535.

Cases: Chicago v. Burke, 226 Ill. 191 (1907).

Chicago v. Wisconsin Lime and Cement Co., 312 Ill. 520 (1924).

Speigler v. Chicago, 216 Ill. 114 (1905).

Arms. v. Ayer, 192 Ill. 601 (1901).

Fuel Oil Delivery: It is unlawful to sell or deliver any fuel oil by a wheeled conveyance unless the same shall be measured at the place of delivery by a standard liquid measure or by a meter which has been tested, approved and sealed by the Inspector of Weights and Measures.—Coun. J. (1935-36), p. 546.

REGULATION OF OLD GOLD DEALERS

(No. 7789—*City Sealer—M. F. M.—October 21, 1932—1 p.*)

Dealers in old gold are amenable to the city's short weight ordinance.

Citation:

Ordinance: Code '31: 2932.

FALSE WEIGHT OF LAUNDRY BUNDLES

(No. 7440—*City Sealer—F. J. B.—February 5, 1932—5½ pp.*)

While a laundry company cannot be prosecuted under the *Revised Code of 1931* for falsifying the weight of a laundry bundle, it can be prosecuted under "An Act in Relation to Weights and Measures."

Citations:

Statute: SH '31, 147: 39.

Ordinance: Code '31: 2929, 2930, 2932-37, 2944, 2947, 2956.

Cases: Peterson v. Currier, 62 Ill. App. 163 (1895).

People v. Federal Security Co., 255 Ill. 561 (1912).

Atchison, Topeka and Santa Fe Railway v. People, 227 Ill. 270 (1907).

Burton v. Chicago, 236 Ill. 383 (1908).

City of Lincoln v. Gerard, 329 Ill. 501 (1928).

Chicago v. Wilshire, 243 Ill. 123 (1909-10).

Other reference: Webster's International Dictionary, "commodity."

G. OTHER SPECIFIC REGULATIONS

DISTRIBUTION OF ADVERTISING MATTER*

(No. 7116—*Acting Commissioner of Police—M. H. F.—September 9, 1931—3 pp.*)

The provision in the 1922 Code which prohibits the distribution of advertising matter other than by putting it in letter boxes or under doors is invalid.

Citations:

Ordinances: Code '22: 366.

Code '31: 1007.

Case: Chicago v. Schultz, 341 Ill. 208 (1931).

Opinion No. 7603 of June 13, 1932, to the Commissioner of Public Works is in accord with the above opinion.

Distributing Handbills in Streets: The ordinance absolutely prohibiting the distribution of advertising matter in city streets (Coun. J. 1933-34, p. 361) was amended so that such distribution is permitted if done in a manner so as not to litter the streets.—Coun. J. (1933-34), p. 852.

DISTRIBUTION OF HANDBILLS ON CITY STREETS*

(No. 8745—*Commissioner of Police—W. V. D.—April 16, 1935—1½ pp.*)

The passing out of advertising matter on the streets of the city is prohibited by ordinance if done indiscriminately with the possibility of the matter falling while being passed out or of littering the street or sidewalk.

Citation:

Ordinance: Code '31: 4281.

Opinions No. 7353 of December 8, 1931, and No. 8323 of March 12, 1934, both to the Commissioner of Police, and opinion No. 7698 of August 8, 1932, to the Chairman of the Committee on Judiciary and State Legislation are in accord with the above opinion.

Distribution of Handbills: The distribution of handbills or other advertising matter to occupants of automobiles or in unoccupied automobiles while on city streets has been made a punishable offense.—Coun. J. (1932-33), p. 2784.

A Los Angeles ordinance prohibiting the distribution of handbills among pedestrians upon public places or passengers in streets or throwing handbills upon any vehicle was held valid as a police regulation to prevent the littering of public streets and places.—Law Bulletin, December 5, 1935.

*See Opinions No. 7649 and No. 7728, p. 677, on the use of the streets for advertising.

DISTRIBUTION OF ADVERTISING MATTER ON PRIVATE PROPERTY*

(No. 8862—*W. V. D.*—September 3, 1935—1½ pp.)

There is doubt as to the right of the city to regulate the distribution of advertising matter on private property.

Citations:

Ordinance: Code '22: 366.

Case: Chicago v. Schultz, 341 Ill. 208 (1931).

Distributing Advertising Circulars: The injunction order of the Superior Court forbidding the distribution of advertising circulars in Chicago unless they are fastened securely enough to prevent the wind from scattering them was reversed by the Appellate Court, and on appeal to the Supreme Court, the decision of the Appellate Court was affirmed.—*Hallberg v. Goldblatt Bros., Inc.*, 280 Ill. App. 625 (1935); *Hallberg v. Goldblatt Bros., Inc.*, 363 Ill. 25 (1936).

DISTRIBUTION OF RELIGIOUS TRACTS AND BELIEFS*

(No. 8167—*Commissioner of Police—C. H. L.*—September 7, 1933—2 pp.)

The distribution of religious tracts and pamphlets on religious beliefs does not constitute the dissemination of advertising matter which is prohibited by ordinance.

Citations:

Ordinance: Code '31: 4281 (as amended, Coun. J., 1933-34, p. 852).

Case: Chicago v. Schultz, 341 Ill. 208 (1931).

DISTRIBUTION OF HANDBILLS TO AUTOISTS*†

(No. 7352—*Commissioner of Police—F. J. B.*—December 8, 1931—2½ pp.)

The distribution to motorists at traffic lights of handbills that contain advertising matter is lawful if done in an orderly manner.

Citations:

Ordinances: Code '31: 1007, 4210, 4281.

Code '22: 366.

Case: Chicago v. Schultz, 341 Ill. 208 (1931).

DISTRIBUTION OF HANDBILLS BY POLICEMEN*

(No. 6807—*Acting Commissioner of Police—November 28, 1930—S. L. G., J. G. D., C. J. A., E. C. H. and J. L.*—2½ pp.)

The distribution of handbills, intended to increase the business of the city and to promote the prosperity of its inhabitants, by police

*See Opinions No. 7649 and No. 7728, p. 675, on the use of the streets for advertising.

†See annotation "Distribution of Handbills," p. 409.

officers is legal and a proper police function as it tends to reduce crime by lessening unemployment.

Citations:

Ordinances: Code '22: 2718, 3076.

Cases: State v. Central Lumber Co., 123 N.W. 504.
Masonic Fraternity Temple Association v. Chicago, 131 Ill. App. 1 (1889-90).
Chicago, Burlington and Quincy Railroad v. Illinois, 200 U. S. 561 (1906).
Blake v. City of Pontiac, 49 Ill. App. 543 (1893).
Gillman v. Philadelphia, 70 U. S. 713 (1865).

ADVERTISING BY SAMPLES AND AMPLIFIER*

(No. 8310—*Commissioner of Police—C. N.—February 20, 1934—2½ pp.*)

The mere passing out of free samples from a store doorway without other obnoxious features, provided the sidewalk is not actually used in this activity, does not violate the City Code.

The use of an amplifier by a store for purposes of advertising, is not a violation of the City Code unless it is so noisy that it can be classed with loudly audible sounds such as crying, calling or shouting.

Citations:

Ordinances: Code '31: 1008-09, 4194.

ADVERTISING FROM AUTOMOBILE PARKED IN STREET*

(No. 8802—*Commissioner of Public Works—R. D. K.—June 25, 1935—2½ pp.*)

Advertising by means of a large sign attached to an automobile parked in a city street is not prohibited by ordinance.

Citations:

Ordinance: Code '31: 973.

Other reference: Op. Corp. Counsel (1925-27), p. 310.

ADVERTISING SIGN VIOLATING ORDINANCE*

(No. 6433—*Commissioner of Buildings—F. J. C.—May 11, 1929—2 pp.*)

An advertising sign of a character prohibited by the provisions of the zoning ordinance may be removed under section 31 of that ordinance.

Citations:

Ordinance: Zoning ord., sec. 31.

Other reference: 16 Op. Corp. Counsel 190.

*See Opinions No. 7649 and No. 7728, p. 675, on the use of the streets for advertising.

REPORTING OF INJURY BY GUN

(No. 7769—President, Board of Health—L. H.—October 11, 1932—
1½ pp.)

There is no law which imposes a duty on a person to report his suspicions when he renders aid to one who is suffering from a gunshot wound.

Citation:

Statute: Criminal Code, secs. 84, 85, 86, 88, 92.

REGULATION OF AMBULANCE CHASING

(No. 7716—City Council—G. E. G.—August 15, 1932—1½ pp.)

The City of Chicago has no authority to regulate ambulance chasing.

REGULATION OF ASTROLOGY

(No. 8094—Commissioner of Police—C. N.—June 15, 1933—3½ pp.)

Astrology is legally considered a crafty science, and an astrologer who advertises as an adviser on love, marriage, business, and other matters, and charges for his advice, is violating the city's ordinances and should be suppressed by the Police Department.

Citations:

Statutes: Cah. '31, 38: 273, 274.

Ordinances: Code '31: 4253, 4254.

Case: Chicago v. Ross, 257 Ill. 76 (1912).

DISPOSITION OF LOST OR UNCLAIMED AUTOS*

(No. 7511—Mayor—E. J. B.—March 25, 1932—2 pp.)

The city has the right, on recovering an abandoned, lost, stolen, or unclaimed automobile, to tow it immediately to any garage designated by the city to receive these vehicles, and then to hold it for a reasonable time. At the expiration of that time, the vehicle should be dealt with according to section 35(d) of the Illinois Motor Vehicle act, which prescribes the necessary procedure for the sale of unclaimed automobiles by the city.

Citations:

Statute: Motor Vehicle act, sec. 35(a-d).

Other reference: 13 Blackstone's Commentaries 91.

*See also opinions on p. 112.

RIGHT OF CITY TO INSPECT AUTOMOBILES

(No. 7367—*Chairman, Committee on Traffic and Public Safety—C. J. A.—December 11, 1931—3 pp.*)

A more specific authorization of power from the legislature is necessary before the City Council can enact an ordinance requiring the periodic inspection of automobiles.

Citations:

Statutes: SH '31, 24: 65.65.

Motor Vehicle act, sec. 26.

Case: Arms v. Chicago, 314 Ill. 316 (1925).

Auto Inspection: Any city having a population exceeding 40,000 may by ordinance require the resident owner of a motor vehicle to submit, not more often than semi-annually, to a compulsory inspection of the mechanics and equipment of the motor vehicle.—Ill. Laws (1935), p. 1228.

All motor vehicles for the transportation of persons or property owned and operated by residents of the city on city streets must be inspected at one of the municipal testing stations established throughout the city. Such inspection shall be to test whether the motor vehicle conforms with the standards for safe operation required by law.—Coun. J. (1935-36), p. 824.

Appropriations for Auto Inspection: Any city over 40,000 may appropriate monies annually from vehicle licenses for construction and operation of testing stations for the inspection of motor vehicles.—Ill. Laws (1st sp. sess., 1935), p. 63.

Auto Accident Reports: Any city may by ordinance require that the driver of a vehicle involved in an accident shall file with a designated department a report of such accident for the confidential use of the city department.—Ill. Laws (1935), p. 1257.

SALE OF AUTOMOBILE MASTER KEYS

(No. 8111—*Committee on Judiciary and State Legislation—D. H. N.—July 10, 1933—2 pp.*)

The city has no power to pass an ordinance prohibiting persons from selling automobile master keys.

Citations:

Cases: Arms v. Chicago, 314 Ill. 316 (1925).

People v. Chicago, 261 Ill. 16 (1913-14).

USE OF AUTOS BY CRIMINALS

(No. 7273—*F. J. B.—November 9, 1931—1½ pp.*)

An automobile is not a deadly weapon *per se*, and there is doubt as to the constitutionality of a proposed law to prevent its use or possession by persons alleged to be "known and habitual criminals."

RED PAINT AND SIRENS ON PRIVATE VEHICLES

(No. 8789—*M. H. F.*—June 7, 1935—2½ pp.)

An ordinance prohibiting the use of red painted automobiles or gongs and sirens on vehicles other than fire apparatus, fire patrol vehicles, ambulances, street cars, and emergency vehicles of the city, county, and public utilities is reasonable, valid and promotive of public welfare.

The fact that violations of a city ordinance have continued for some time, and that the ordinance has not been universally enforced, does not prevent the city from enforcing the ordinance.

Citation:

Ordinance: Uniform Traffic code, sec. 70.

PROHIBITION OF RED AUTOMOBILES

(No. 7214—*C. J. A.*—October 26, 1931—2½ pp.)

The ordinance forbidding automobiles except those of the Fire Department to be painted red is constitutional and valid.

Citations:

Statute: SH '31, 24: 65.65.

Ordinance: Code '31: 2036.

Cases: Culver v. City of Streator, 130 Ill. 238 (1889-90).

Williams v. Chicago, 266 Ill. 267 (1915).

Chicago v. Mandel Bros., 264 Ill. 206 (1914).

Patterson v. Johnson, 214 Ill. 481 (1905).

Other reference: Op. Corp. Counsel (1920-23), p. 381.

REMOVAL OF AUTO ENGINE NUMBERS

(No. 8347—*Commissioner of Police—M. H. F.*—March 30, 1934—3½ pp.)

The practice of an automobile salvage company, which consists in chiseling off motor numbers and then selling the motors to dealers in used cars, is unlawful.

Citations:

Statute: SH '33, 121: 235.

Cases: People v. Billardello, 319 Ill. 124 (1926).

People v. Oberby, 323 Ill. 364 (1927).

STAMPING NUMBERS ON REBUILT AUTOS

(No. 8269—*Commissioner of Police—M. H. F.*—January 11, 1934—5½ pp.)

The owner of a motor vehicle and the automobile agency which

stamps on a rebuilt engine substituted in it for the old engine the numbers of the old engine violate the Motor Vehicle act.

Citations:

Statutes: SH '33, 121: 235, 236.

Cases: *People v. Billardello*, 319 Ill. 124 (1926).

People v. Oberby, 323 Ill. 364, 366 (1927).

AUTO RADIOS RECEIVING POLICE CALLS

(No. 7892—*Commissioner of Police—R. N.—January 10, 1933—1½ pp.*)

No ordinance regulates or prohibits the sale of radios which will bring in police calls.

The statute controlling radio broadcasting stations and the acquisition of radio receiving sets for police purposes, does not regulate the sale of radio receiving sets which will pick up police calls, unless they are for use in automobiles.

Citation:

Statute: Ill. Laws (1931), p. 460 (Radio broadcasting stations for police purposes, sec. 4).

AUTO RADIOS RECEIVING POLICE CALLS

(No. 7671—*Secretary to County Judge—F. J. B.—July 28, 1932—2 pp.*)

Radio sets capable of receiving short wave lengths and police alarms can not be installed in autos, not possessed by peace officers, without permission from the County Sheriff.

Citations:

Statutes: Ill. Laws (1931), pp. 460, 461 (Radio broadcasting and receiving sets for police, secs. 4, 5).

USE OF AUTO AIR-HORNS

(No. 6768—*Acting Commissioner of Police—C. J. A.—September 12, 1930—7½ pp.*)

Neither the Commissioner of Health nor the Commissioner of Police has any authority to forbid absolutely the use of air-horns on automobiles under all circumstances, since no ordinance has declared their use to be a nuisance. However, the Commissioner of Police may prevent a disturbance of the public peace by an unreasonable use of air-horns.

The use of an automobile air-horn may not be regarded as evidence of a dangerous speed and a violation of the motor vehicle act, as the

rate of speed is itself only *prima facie* evidence of negligent driving.

Citations:

- Statutes:** Cities and Villages act, art. V, sec. 75.
SH '29, 121: 224.
Ordinances: Code '22: 2196, 2200.
Cases: Laugel v. City of Bushnell, 197 Ill. 20 (1902).
People v. Chicago 260 Ill. 150 (1913).
Kevern v. People, 224 Ill. 170 (1906-07).
Morrison v. Flowers, 308 Ill. 189 (1923).
Hoigard v. Yellow Cab Co., 320 Ill. 317 (1926).

BIRTH CONTROL CLINICS

(No. 7766—Alderman, 7th Ward—C. J. A.—October 11, 1932—8 pp.)

Even if a birth control establishment does not fall within the classification of a dispensary as defined in the Code, yet it is within the power of the City Council to so amend that definition as to include the establishment, if it be so desired.

The City Council might suppress birth control establishments by declaring them to be nuisances and causing them to be abated as such.

Citations:

- Statutes:** SH '31, 38: 4, 5, 6.
Id., 24: 65.74.
Ordinance: Code '31: 2284.
Cases: People v. Schuettler, 209 Ill. App. 588 (1918).
People v. Deuer, 236 Ill. App. 135 (1924-25).
Chicago v. Shavarin, 258 Ill. 69, 72 (1913).
Laugel v. City of Bushnell, 197 Ill. 20, 26 (1902).
Other reference: Op. Corp. Counsel (1924-25), p. 500.

DISTRIBUTION OF BIRTH CONTROL CIRCULARS IN DRUG STORES*

(No. 6700—Commissioner of Health—M. H. F.—June 24, 1930—4½ pp.)

The distribution in a drug store of advertising circulars on birth control and feminine prophylactics with the sale of contraceptive devices is not directly prohibited by any federal, state, or municipal law.

Citations:

- Statutes:** SH '29, 38: 6, 468.
Barnes, Federal Code (1919), sec. 9908.
Ordinances: Code '22: 2671-73.

*See also opinions, pp. 423, 424, on contraceptives.

BULL FIGHTING

(No. 8451—*Commissioner of Police—W. V. D.—June 30, 1934—2 pp.*)

Persons presenting an exhibition which consists in bull fighting or baiting the bull may be arrested and prosecuted for a violation of the state law.

Citation:

Statute: Cah. '33, 38: 146.

BURIAL OF PERSONS DEAD FROM CONTAGIOUS DISEASE*

(No. 8399—*President, Board of Health—B. J. K.—May 19, 1934—4 pp.*)

In regard to the burial of persons dying from communicable diseases, the Board of Health has the authority to pass additional and more stringent regulations than the minimum requirements of the Illinois Department of Public Health.

The Board of Health acts legally and within its power when it enforces an ordinance relating to the burial of persons who died of a contagious or infectious disease or other disease, the symptoms of which closely resemble a contagious disease.

Citations:

Statute: Cah. '33, 24: 65 (78).

Ordinance: Code '31: 2186.

Other reference: Manual and Outline of Procedure for Health Officers for the Control of Communicable Diseases (Ill. Dept. of Health, Oct. 1, 1932), pp. 9, 32.

Canned Poultry: All canned poultry and canned poultry products sold within the city must be first inspected and passed as fit for human consumption by the United States Department of Agriculture.—Coun. J. (1935-36), p. 1544.

DEFINITION OF A CEMETERY

(No. 8482—*Alderman, 38th Ward—C. H. L.—July 27, 1934—6½ pp.*)

A cemetery in which only one actual burial took place prior to the passage of the 1931 cemetery ordinance which prohibits burials except upon authorization, unless such place was used as a burial place before the ordinance, is nevertheless deemed to have been "actually and continuously used as a cemetery," since the entire tract of land has been systematically arranged, kept, preserved and maintained as

*Opinions on pp. 544-548 deal with undertaking establishments.

a cemetery and there exists nothing to indicate that this original use had been discontinued or abandoned.

Citations:

Ordinance: Code '31, sec. 2197, as amended Oct. 21, 1931.

Case: Brown v. Hill, 284 Ill. 286 (1918).

REGULATION OF CEMETERIES

(No. 8592—Alderman, 39th Ward—C. H. L.—December 15, 1934—5 pp.)

The legislature has the power to control and regulate cemeteries and may delegate this power to the city.

A cemetery has the legal right to use the property acquired by it in accordance with ordinances passed by the City Council.

Citations:

Statute: SH '29, 24: 65.78.

Ordinances: Code '31: 2197(a) as amended Coun. J. (1931-32), p. 1121.
Coun. J. (1912-13), p. 900.
Id. (1933-34), p. 771.

Case: Catholic Bishop v. Palos Park, 286 Ill. 400 (1919).

BURIALS IN UNLICENSED CEMETERIES

(No. 6877—Acting Commissioner of Health—L. H.—April 25, 1931—2½ pp.)

While the municipal code makes it unlawful to bury a body without a permit, there is no provision in the Code that compels burial in licensed cemeteries.

Citation:

Ordinance: Code '22: 1909.

ESTABLISHMENT AND ENLARGEMENT OF CEMETERIES IN LAKE VIEW AND CHICAGO

(No. 7041—Mayor—C. J. A.—July 30, 1931—5 pp.)

By virtue of the Act of 1869, no new cemetery can be established or an old one enlarged in the town of Lake View unless this question is first submitted to a popular vote; in the rest of Chicago, a cemetery company may acquire only such ground as is necessary for burial purposes.

Under the Chicago Zoning ordinance the establishment or enlargement of cemeteries in any zoning district is a "special use" subject to the requirements that it will not seriously injure the appropriate use of neighboring property.

In the absence of any ordinance requiring the consent of the City

Council to the establishment or enlargement of a cemetery, it is doubtful whether such consent would be legally necessary.

Citations:

- Ordinance: Zoning ord., secs. 3, 13.
Statutes: Ill. Private Laws (1869), vol. 4, p. 311.
SH '29, 21: 29, 39.
Id., 24: 65, 78.
-

Cemetery Extension: The fact that additional land acquired by a cemetery company is separated by a public highway from land already used for that purpose does not constitute the creation of a new cemetery in violation of its charter powers but constitutes an addition to the old cemetery which its charter authorizes it to acquire.

Where a cemetery company at the time of the adoption of the Constitution of 1870 had organized as a corporation and was exercising the powers conferred upon it by its charter, a provision of the charter authorizing it to acquire 500 acres of land for cemetery purposes is not abrogated by section 2 of article II of the Constitution merely because it had not acquired that much land when the Constitution was adopted.

A cemetery is not a nuisance *per se*, but before it can be abated or its use enjoined it must be clearly and satisfactorily proved to be a nuisance, and where a municipal corporation has taken no action under the provisions of article 5 of the Cities and Villages act to prohibit an addition to a cemetery as authorized by the charter of the cemetery company, it must be proved to be a nuisance before the use of the addition for cemetery purposes can be enjoined.—*Rosehill Cemetery Co. v. Chicago*, 352 Ill. 1 (1933).

Opinions No. 6822 of December 30, 1930, to the North Town Improvement Association, and No. 7022 of July 20, 1931, to the Chairman of the Committee on Judiciary and State Legislation, and No. 7077 of August 18, 1931, to the Alderman of the 50th Ward, all discuss the same subject matter as the above case.

Rosehill Cemetery Expansion: A permanent injunction issued by the Cook County Superior Court on December 9, 1935, restrains the city from enforcing an ordinance passed in October, 1931, which would have prevented the Rosehill Cemetery Company from continuing to use as a burial ground the twenty-five acre tract across Peterson avenue from the main cemetery. An appeal was taken to the Supreme Court.

ADMINISTRATION OF MOVIE CENSORSHIP

(No. 7384—Mayor—L. H.—December 15, 1931—2 pp.)

The censorship of motion pictures and the responsibility of issuing permits for such pictures rests with the Commissioner of Police, except in so far as the Mayor has power to review his rulings.

The Board of Censors being merely a part of the Police Department, can be abolished by the failure of the City Council to make an ap-

appropriation for it subject, however, to any civil service rights that these censors may have.

Citation:

Ordinance: Code '31: 1953-55.

Movie Censorship: A writ of mandamus was denied to compel the issuance of a permit to exhibit a motion picture entitled "Sex Madness," depicting the evils of companionate marriage, on the ground there would be such a difference of opinion as to whether it was moral or not that the Superintendent of Police did not abuse his discretion in refusing the permit.—*Edwards v. Thompson*, 262 Ill. App. 520 (1931).

REFUSAL OF PERMIT FOR GANGSTER MOVIE

(No. 6497—*Censor Board—W. V. D.—August 23, 1929—2 pp.*)

The city has the right to refuse a permit for the exhibition of a motion picture which portrays crime and murder and tends to laud the gangster.

Citation:

Case: *Block v. Chicago*, 239 Ill. 265 (1909).

REFUSAL OF PERMIT FOR EXHIBITION OF MOVIES TO ADULTS

(No. 6737—*Acting Commissioner of Police—C. J. A.—July 30, 1930—2½ pp.*)

The Commissioner of Police has the right to deny a permit to exhibit a motion picture which he or Board of Censors deem unfit, even as to an exhibition for adults only.

Authority to issue special permits limiting the exhibition of questionable motion pictures to adults does not contemplate great leniency in granting such permits but merely contemplates that extra caution should be taken when granting a general permit for the exhibition of a picture which may be seen by children.

Citation:

Ordinance: Code '22: 2787-88.

REVOCATION OF PERMITS TO EXHIBIT MOVIES

(No. 7049—*Commissioner of Police—J. F. G.—August 3, 1931—3 pp.*)

Permits for the exhibition of moving pictures once granted by the city are not revocable and the picture or series of pictures may be shown by any other exhibitor if written notice of a transfer or a lease to such other exhibitor is first duly mailed to the Commissioner of Police.

If the "Birth of a Nation" exposes the negro race to contempt, derision or obloquy, despite a permit to exhibit it and an injunction against interference by the city, it is unlawful under a statute passed subsequent to the injunction decree to exhibit the picture and punishable by fine. The matter should be handled by the State's Attorney.

Citations:

Ordinance: Code '31: 1959.

Statute: Cah. '29, 38: 457.

Opinion No. 6505 of September 11, 1929, discusses the same point as the above opinion.

CENSORSHIP OF "TALKIE MOVIES"

(No. 6452—*Chairman, Committee on Finance—E. M. K.—June 17, 1929—8½ pp.*)

The city has the authority under its police powers to censor "talkie movies" and present censorship ordinances are broad enough to include them.

Citations:

Ordinances: Code '22: 2785-87.

Cases: Block v. Chicago, 239 Ill. 251, 258 (1909).

In re Fox Film Corp., 295 Pa. 461, 145 Atl. 514.

CENSORSHIP OF DIALOGUE IN TALKING PICTURES

(No. 6874—*Acting Commissioner of Police—W. V. D.—April 23, 1931—2 pp.*)

If the dialogue of a motion picture, or any portion of it, is objectionable, the Censor Board, before issuing a permit, may require its elimination in the same manner as it would censor an objectionable scene.

Citations:

Ordinance: Code '22: 2787.

Case: United Artists Corp. v. Thompson, 339 Ill. 595 (1930).

CENSORSHIP OF MOVIE, DRAMA AND VAUDEVILLE BEFORE PRESENTATION*

(No. 6559—*Commissioner of Police—J. N. K.—December 10, 1929—3½ pp.*)

The Police Department cannot censor plays, vaudeville shows, and the like until they have been presented. Motion pictures can be censored by the Police Department before presentation.

Citations:

Ordinances: Code '22: 2668, 2786, 2787.

Statute: Cah. '27, 38: 459.

*See annotation "Stage Play Censorship" on the following page.

Stage Play Censorship: Revocation of a theater license by the Mayor was upheld by the Circuit Court of Appeals when such theater allowed the production of "Tobacco Road," a play found by the Mayor to be indecent and degrading, and therefore in violation of city ordinances prohibiting indecent acts. The Mayor's action will not be disturbed by the courts unless he acted arbitrarily.—*Chicago v. Kirkland*, 79 F. (2nd) 963 (1935).

CHARITABLE COLLECTIONS IN STORES

(No. 8538—*County Clerk—E. R. D.—October 25, 1934—1 p.*)

Coin boxes may be set up in local business establishments to obtain donations for strictly charitable purposes.

SALE OF CIGARETTES NEAR SCHOOL*

(No. 7473—*Commissioner of Police—W. L. S.—March 2, 1932—3 pp.*)

The city ordinance prohibiting the sale of cigarettes within 300 feet of a school building, applies to places which were already licensed to sell at their present address before the coming of the school building.

Citations:

Cases: *Standard Oil Co. v. City of Danville*, 199 Ill. 50 (1902).

School of Domestic Arts v. Carr, 322 Ill. 570 (1927).

Other reference: *Op. Corp. Counsel* (1924-25), p. 556.

CHILD LABOR IN RADIO STATION

(No. 7907—*Mayor—L. H.—January 18, 1933—3 pp.*)

A permit cannot lawfully be granted to allow the employment of a child under fourteen years of age in a broadcasting studio, even though the employer might not be subject to the statute calling for criminal prosecution in cases of employment of these children.

Citations:

Statutes: SH '31, 48: 17, 19, 20, 30.

VIOLIN RECITAL PERMIT TO CHILD

(No. 7916—*Jud. G.—January 26, 1932—1 p.*)

It is illegal to give a permit to a nine year old violinist to appear in a recital.

Citation:

Statute: SH '31, 48: 17.

*See also opinions, pp. 513, 514, on licensing cigarette sales.

REGULATION OF COAL AND LUMBER YARDS*

(No. 6656—*Secretary, Commission on Revenue*—L. H.—April 29, 1930—3½ pp.)

The city's power "to regulate the inspection, weighing and measuring of bricks, lumber, firewood, coal, hay, and any article of merchandise" relates to the commodities themselves, not to places of business which handle them, and does not give the city authority to control the location of those places of business.

The 93rd clause of section 1, article V of the Cities and Villages act gives to the city the power to control the location of lumber and coal yards within its fire limits, and the city could require the obtaining of frontage consents for the establishment of such yards, but that clause provides that any lumber or coal yard existing at the time of the passage of any ordinance pursuant to that clause may not be removed.

Citations:

Statutes: Cities and Villages act, art. V, sec. 1, cl. 54, 93, 95.

Cases: Schwuchow v. Chicago, 68 Ill. 161 (1873).

People v. Kaul, 302 Ill. 317 (1922).

Chicago v. Stratton, 162 Ill. 494 (1896).

Other reference: Opinion No. 6587 (this volume, p. 515).

SALE OF CONTRACEPTIVES†

(No. 8433—C. N.—June 14, 1934—2 pp.)

Preventive non-toxic contraceptives may be sold in Chicago provided all laws and ordinances regarding advertising and the use of the mails are observed.

Citations:

Statute: SH '33, 38: 6.

Ordinance: Code '31: 4285.

SALE OF PROPHYLACTICS AND CONTRACEPTIVES

(No. 7781—*Commissioner of Police*—W. V. D.—October 18, 1932—3½ pp.)

The city has power to regulate or suppress the placing of prophylactic vending machines in public places.

There is no state statute specifically prohibiting the sale or dis-

*See also opinions on pp. 514, 515.

†See also opinions, p. 416, on birth control.

tribution of articles for prevention of venereal diseases or for prevention of conception.

Since the city may refuse a license to an institution or individual because the moral tendency of the institution or individual is questionable, the city may take affirmative action to regulate or suppress that institution or individual.

Citations:

Statutes: SH '31, 38: 4, 5, 6,

Ordinance: Code 31: 4225.

Cases: *People v. Scheutter*, 209 Ill. App. 588 (1918).

People v. Dever, 236 Ill. App. 135 (1925-26).

SALE OF CONTRACEPTIVES

(No. 8477—Mayor—J. F. G.—July 18, 1934—1 p.)

The City Council is without authority to pass an ordinance which prohibits the sale of contraceptive devices by anyone except licensed pharmacists or doctors.

The City Council is without authority to add to the catalogue of crimes and misdemeanors which have been established by the state law.

The City Council cannot, as a penalty for an ordinance violation, impose a fine in excess of \$200 or cause imprisonment in excess of six months.

REWARD TO PRIVATE PERSONS FOR CAPTURE OF CRIMINALS

(No. 7027—Chairman, Committee on Finance—F. J. B.—July 24, 1931—2 pp.)

The city has no authority to offer a reward for the efforts of private persons in the capture of criminals nor may it recognize such accomplishments by a money award.

Citations:

Cases: *Agnew v. Brall*, 124 Ill. 312 (1888).

Chicago v. Pittsburgh, Cincinnati, Chicago and St. Louis Railway Co., 244 Ill. 220 (1910).

Other reference: *McQuillin*, Mun. Corp. (2nd ed.), sec. 403.

REQUIREMENT OF OWNER'S NAME ON DELIVERY VEHICLE

(No. 8841—C. N.—August 9, 1935—2 pp.)

The ordinance requiring the name of an owner to be painted upon vehicles used for delivery purposes does not contemplate the use of

a sign removable at will, and does not permit the change of the nature of those vehicles from time to time to suit the convenience of a temporary user.

Citations:

Ordinances: Uniform Traffic code (as amended to July 11, 1933), sec. 26. Code '31: 2065.

Disorderly Houses: Section 4215 of the Revised Code of 1931 declaring that "every common, ill-governed or disorderly house, room, or other premises, kept for the encouragement of idleness, gaming, drinking, fornication or other misbehavior" to be a public nuisance was upheld as valid.—*Chicago v. Clark*, 359 Ill. 374 (1935). See also opinions, p. 441, on prostitution.

IMPOUNDING OF VICIOUS AND NON-VICIOUS DOGS

(No. 7472—*President, Board of Health—Jud. G.—March 2, 1932—1½ pp.*)

Any person receiving a dog from the place where it had been impounded has the duty of securely muzzling and chaining this dog for a period of fifteen days after the date of receiving the dog.

It is the duty of a policeman to take up all dogs that are vicious, and all dogs, whether they are vicious or not, that have bitten anyone causing an abrasion of the skin, and to deliver them to the keeper of the dog pound.

If any dog cannot be taken up and impounded, he may be slain. If a dog is slain less than fifteen days from the date on which the dog bit any person, the carcass and brain should be delivered to the Health Department.

Citation:

Ordinance: Code '31: 3966.

SALE OF TRADE-NAMED DRUGS—SALE OF ASPIRIN FROM VENDING MACHINE

(No. 7650—*Commissioner of Police—F. J. B.—July 15, 1932—4½ pp.*)

The mere fact that a drug or medicine is sold under a trade name in packages with directions for its use and is not compounded or prepared by the seller does not make it a patent or proprietary preparation or remedy within the meaning of Illinois Pharmacy act.

Aspirin, though sold in original and unbroken packages, is not a patent or proprietary preparation or remedy but a drug or medicine, which under Illinois Pharmacy act, must be sold only by a registered

pharmacist or an apprentice under his immediate supervision and hence may not be sold by means of a vending machine.

Citations:

Statutes: SH '31, 91: 36-55.

Ordinances: Code '31: 2353-78, 3380-85.

Cases: Lowenthal v. Chicago, 313 Ill. 190 (1925).

Noel v. People, 179 Ill. 587 (1900).

Ex Parte Gray, 274 Pac. 974 (1929).

Cook v. People, 125 Ill. 278 (1888).

Board of Pharmacy v. Abramoff, 141 Atl. 587 (1928).

State v. Zotalis, 214 N. W. 766 (1927).

State v. Donaldson, 41 Minn. 74 (1889).

DISTRIBUTION OF SAMPLE PILLS

(No. 7477—*Jud. G.*—*March 3, 1932*—1 p.)

The distribution of samples of vegetable laxative pills on the streets and in houses is contrary to the City Code, but these samples may be left with licensed druggists for distribution to their customers.

Citation:

Ordinance: Code '31: 2366.

DUMPING ON VACANT LOT*

(No. 7960—*A. F. G.*—*March 3, 1933*—1½ pp.)

The owner of a vacant lot, the natural level of which is three feet below the sidewalk level, cannot be compelled to erect a fence on the lot, but dumping there is prohibited by ordinance.

Citations:

Ordinances: Code' 31: 2392, 4235.

REGULATION OF ELECTRICAL EQUIPMENT AND CONTRACTORS—RECOVERING ORDINANCE FINES

(No. 7691—*Commissioner of Gas and Electricity—C. J. A.*—*August 4, 1932*—3½ pp.)

A failure to comply with the ordinances governing the registration of electrical contractors and the installation of electrical wires and apparatus may be prosecuted as a violation of the Electrical Com-

An action to recover a penalty for the violation of an ordinance is a mere civil action for which an action in debt or assumpsit will lie and hence penalties for such violation can be legally sued for in any part of the state where the defendant might be found.

Citations:

Statute: SH '31, 24: 683 (a, d).

Cases: Town of Jacksonville v. Black, 36 Ill. 507 (1864-65).

Wiggins v. Chicago, 68 Ill. 37 (1873).

Chicago v. Nobel, 232 Ill. 112 (1908).

Berry v. Chicago, 320 Ill. 536 (1926).

*See also Opinion No. 7674, p. 371.

EDUCATION TO ELIMINATE SUB-STANDARD ELECTRICAL MATERIAL

(No. 7763—*Commissioner, Department of Gas and Electricity—W. L. S.—October 8, 1932—1½ pp.*)

Any law that seeks to infringe upon the right of any citizen or public official to advocate by education or other peaceable means in the interest of the public welfare the elimination of sub-standard electrical materials from the Chicago market is invalid under the Federal and State Constitutions.

SALE OF ELECTRICAL EQUIPMENT*

(No. 7818—*Commissioner, Department of Gas and Electricity—W. L. S.—November 26, 1932—3½ pp.*)

An ordinance controlling the sale of electrical equipment would not interfere with the Interstate Commerce Commission law, nor violate the State Constitution, but whether such ordinance would be a proper exercise of the police power must be determined by the courts.

DISCONNECTION OF CURRENT FROM UNINSPECTED ELECTRIC WIRES†

(No. 7710—*Commissioner of Gas and Electricity—R. N.—August 11, 1932—2 pp.*)

The Department of Gas and Electricity may disconnect the electric current from wires and apparatus which has not been inspected and for which no permit has been issued.

EXPLOSIVES, SALES OF TOY CANNONS AND CARBIDE PREPARATIONS‡

(No. 6430—*Fire Commissioner—J. W. B.—May 10, 1929—3 pp.*)

The sale of a toy cannon which operates by exploding carbide gas and the sale of a calcium carbide preparation which is not in itself explosive and which is kept in air-tight tubes are not prohibited by ordinance.

Citation:

Ordinance: Code '22: 1451.

*See also Opinion No. 7513, p. 454.

†See also Opinion No. 7841, p. 367, on electrical inspection of public utilities.

‡See also opinions, pp. 519, 520, on licensing explosives.

FIRE ALARM SYSTEMS IN HOTELS AND TENEMENT HOUSES

(No. 8897—*Chairman, Committee for Revising the Building Code—A. F. G.—October 15, 1935—3 pp.*)

The city under its general police powers can enact an ordinance requiring the installation of fire alarm systems in hotels and tenement houses so as to lessen the damage and danger from fire.

Citations:

- Cases:** *Williams v. Chicago*, 266 Ill. 267 (1915).
Chicago v. Washingtonian Home, 289 Ill. 206 (1920).
Chicago v. Ripley, 249 Ill. 466 (1911).
King v. Davenport, 98 Ill. 305 (1880).
Arms v. Ayer, 192 Ill. 601 (1901).

OPINION OF FOREGOING SYNOPSIS

Recently you submitted certain provisions of a fire prevention ordinance which you propose to incorporate in the new building ordinance and requested an opinion whether the City Council could enact a valid ordinance requiring existing buildings of certain classes to install standard fire alarm systems as provided in article 518 of the draft submitted.

You direct our attention to the existence of a number of buildings in Chicago, many of which were built prior to the World's Fair of 1893, which are four stories and upward in height, built of ordinary construction and used for hotel and apartment purposes, and inquire whether an ordinance requiring such buildings as these to be equipped with fire alarm systems would stand the test of the courts.

The City of Chicago only has such power as is expressly granted to it by its charter and such as can reasonably be implied from the powers thus granted. In the Cities and Villages act, which is the charter of the city, express powers are conferred upon municipalities to guard against fire, to prevent dangerous constructions and to regulate and prevent the carrying on of manufactories dangerous in promotion of fires, to cause all dangerous buildings to be made safe, to provide fire prevention equipment and to regulate the use of the same, to regulate and prevent storage of combustible or explosive material, and to enforce all necessary police ordinances.

Under the enumerated powers set out above, ordinances requiring additional safeguards against fire in existing buildings have been sustained as a valid exercise of the police power in the following cases: an ordinance requiring fire axes, chemical extinguishers or portable hand pumps in certain class buildings containing more than four apartments, in *Williams v. City of Chicago*, 266 Ill. 267; an ordinance requiring the installation of sprinkler systems, in *Chicago v. Washingtonian Home*, 289 Ill. 206; an ordinance prohibiting the piling of lumber within a particular distance of a private residence, in *City of Chicago v. Ripley*, 249 Ill. 466; an ordinance prohibiting the erection or repair of buildings in fire limits with other than fireproof material, in *King et al v. Davenport, Exor.*, 98 Ill. 305; a statute requiring fire escapes to be placed on certain factory buildings, in *Arms v. Ayer*, 192 Ill. 601.

We find no reported case in our state where our courts have passed on the validity of an ordinance requiring a fire alarm system but in view of their holding that an ordinance requiring sprinkler systems in certain cases to arrest the progress of fire is valid, by analogy we are of the opinion that they would sustain an ordinance requiring the installation of fire alarm systems in hotels and tenement houses to lessen damage and danger from fire.

We think the rule is well stated in *Chicago v. Washingtonian Home*, 289 Ill. 206, where the court says at page 216:

"* * * Any regulation which tends to lessen the damage and dangers of fires and prevents the spreading thereof in densely populated cities is one which tends toward the protection of life and property of the public, and is therefore, unless oppressive and unreasonable, a proper exercise of police power. * * *"

In view therefore of the foregoing we are of the opinion that an ordinance such as you propose, reasonable in its terms, would be sustained as a valid and proper exercise of the police power.

FENCING OF AN ABANDONED STONE QUARRY

(No. 6487—*Alderman, 10th Ward—S. L. G.—August 6, 1929—1½ pp.*)

The owners of an abandoned stone quarry, whether a syndicate or not, may be fined each day for not properly fencing in the excavation, and if a public street were dedicated through this quarry, the Commissioner of Streets would then have to fence in the street.

Citation:

Ordinance: Code '22: 2695.

REGULATION OF INFLAMMABLE LIQUID TANKS*

(No. 7762—*Division Marshal in Charge of Fire Prevention—M. H. F.—September 30, 1932—9½ pp.*)

Inflammable liquid tanks installed before 1912 do not require tank permits or frontage consents.

The city may require the removal of oil tanks when they are a menace to the health, safety and comfort of the people despite the existence of the tanks before the passage of the ordinance. The present ordinance, however, does not intend that they shall so be removed.

A regulation requiring the diking of aboveground tanks located in a thickly populated district of the city is reasonable for the protection of the people against destruction by fire or explosives.

Citation:

Statute: SH '31, 24: 66.

Ordinances: Code '31: 2667, 2670, 2688, 2692.

Cases: *Chicago v. Washingtonian Home*, 289 Ill. 206 (1920).

People v. Hummel, 215 Ill. 43 (1905).

Barrett Manufacturing Co. v. Chicago, 259 Ill. 578 (1913).

Lafin and Rand Co. v. Tearney, 131 Ill. 322 (1889-90).

Spiegler v. Chicago, 216 Ill. 114 (1905).

Standard Oil Co. v. City of Danville, 199 Ill. 50 (1902).

Arms v. Ayer, 192 Ill. 601 (1901).

Other references: 15 Op. Corp. Counsel, p. 104.

Opinion No. 7409 (this volume, p. 525).

37 CJ 168.

*See also Opinion No. 8000, p. 369, on installation of gas tanks.

INFLAMMABLE LIQUIDS*

(No. 7641—*Division Marshal in Charge of Fire Prevention—M. H. F.—July 8, 1932—4 pp.*)

The garage license ordinance places no limit upon the quantity of gasoline which may be stored inside a garage when such gas business is incidental to the garage business.

A public garage operator has the privilege of conducting therein the business of a filling station without the necessity of obtaining an additional license, provided that where a public garage license fee at the annual rate of \$25 or more but less than \$50 has been paid, the combined capacity of all containers or tanks for gasoline storage does not exceed 550 gallons and where such license fee at an annual rate of \$50 has been paid, such combined capacity does not exceed 1065 gallons.

Where a garage owner operates a gasoline filling station outside of the garage building in such a manner that automobiles may approach thereto over a driveway and be supplied therefrom in the same manner as at other gasoline filling stations, all the provisions relating to frontage consents, storage tanks for oil and other regulations of gasoline filling stations apply with equal force to the filling station so operated by such garage owner.

Citations:

Ordinances: Code, '31: 2670, 2689, 3225-56, 3273-84.

Case: Crerar Clinch Coal Co. v. Chicago, 341 Ill. 471 (1931).

TRANSPORTATION OF SULPHURIC AND MURIATIC ACIDS

(No. 7912—*A. F. G.—January 24, 1933—2½ pp.*)

Neither sulphuric or muriatic acid is a volatile liquid within the meaning of the inflammable ordinance and legally may be hauled in any reasonably safe vehicle. Thus, any truck or vehicle, approved by the Chief Fire Prevention Engineer for the transportation of gasoline, may be used for the hauling of muriatic and sulphuric acids.

Citations:

Ordinances: Code '31: 2659, 2667, 2724.

REGULATION OF WASTED FOOD STUFFS

(No. 7870—*Committee on Judiciary and State Legislation—J. F. G.—December 30, 1932—6 pp.*)

An ordinance which prohibits the destruction and waste of food stuffs in order to prevent starvation and sickness and provides for

*See also opinions, pp. 526, 527, on garage and gas stations.

its collection and distribution comes within the police power of the City Council and is constitutional.

Citations:

Statutes: SH '29, 24: 65.49, 65.51, 65.53, 65.65, 65.77.

Cases: Chicago v. M. and M. Hotel, 248 Ill. 264 (1911).

Commonwealth v. Alger, 7 Cush. 53 (1851).

Sessions v. Crunkilton, 20 Ohio St. 349, 356 (1870).

Opinions of the Justices, 267 Mass. 607 (1929).

Shaver v. Starrett, 4 Ohio St. 494, 499 (1855).

Leonard v. State, 100 Ohio St. 456, (1919).

Other references: 2 Cooley, Constitutional Limitations (8th ed.), 343, 1226.

McQuillin, Mun. Corp. (2nd ed.), sec. 936.

CONDEMNED FOOD

(No. 7314—*Commissioner of Health—M. H. F.—November 23, 1931—2 pp.*)

The mere condemnation of food by the Health Department does not divest the owner of property rights therein.

The contract of July 12, 1928, for the removal of dead animals and condemned food products covers only such material as has been abandoned by the owner thereof.

SALE OF SKIMMED MILK CHOCOLATE DRINK

(No. 8216—*President, Board of Health—E. L. M.—November 16, 1933—1 p.*)

The sale of a product consisting of skimmed milk to which has been added chocolate or cocoa syrup and marketed under various names is not prohibited by statute or ordinance.

OPERATION OF GROCERY AND MEAT STORE ON SUNDAY

(No. 6474—*Commissioner of Health—E. M. K.—July 18, 1929—1½ pp.*)

A combination grocery and meat market, having but one entrance, should not be closed on Sunday, where there is no evidence to show that fresh meat is being sold there on that day.

Poultry is included in the ordinance of the city regulating the sale of unwholesome meat.

Citations:

Ordinance: Code '22: 2017, as amended July 15, 1925.

Case: Vosse v. City of Memphis, 77 Tenn. 294 (1882).

RIGHT OF PRIVATE PERSONS TO POSSESS FIREARMS

(No. 6861—Acting Commissioner of Police—M. H. F.—April 9, 1931—11½ pp.)

The carrying or transporting of a pistol or a revolver in an automobile by an individual who does not conceal the weapon or weapons about his person or have them sufficiently close to his person to be readily accessible for immediate use, does not constitute a criminal offense.

People have the right to possess a revolver or pistol in their home or place of business when such are reasonably necessary for protection of the home or business; they may transport the weapon if it is done in an open manner, without concealment on or about their persons.

Citations:

Constitution: United States, Second Amendment.

Statutes: SH '25, 38: 152, 155, 158.

Ill. Private Laws (1867), p. 772.

Ordinances: Code '22: 1248, 1252.

Cases: People v. Niemoth, 322 Ill. 51 (1927).

People v. Lake, 332 Ill. 617 (1929).

Biffer v. Chicago, 278 Ill. 562 (1917).

Other references: Op. Corp. Counsel (1920-23), p. 148.

40 Cyclopedia of Law and Procedure 853.

REGULATION OF WHOLESALEERS OF FIREARMS

(No. 6622—Superintendent, Department of License—M. H. F.—March 18, 1930—5 pp.)

The firearms and weapons ordinances apply to wholesalers as well as retail dealers, except where wholesalers are engaged solely in interstate commerce.

Citations:

Ordinances: Code '22: 1254, 1255, 1257, 1259, 1260, 1263 (Firearms and Weapons).

Statute: SH '29, 131: 1.

Other reference: Op. Corp. Counsel (1920-23), p. 68.

CARRYING OF REVOLVER BY FOREIGN CONSUL

(No. 7166—Commissioner of Police—F. J. B.—October 2, 1931—1½ pp.)

A consul is not entitled to the immunities of a foreign minister and thus the Cuban consul has no greater rights to carry a revolver on his person than has a private individual.

Citation:

Reference: 2 CJ 1307.

RIGHT OF EX-POLICEMAN TO CARRY REVOLVER

(No. 8690—O. F. W.—March 1, 1935—1 p.)

A retired policeman has no greater rights or privileges than any other citizen, and not being on active duty, may not carry a revolver.

SALE OF TOY FIREARMS BY RETAILERS

(No. 6579—Superintendent, Department of License—M. H. F.—January 3, 1930—1 p.)

The toy firearms ordinance is applicable only to retail dealers.

Citations:

Ordinances: Code '22: 1265, as amended (Toy Firearms).
Code '22: ch. 30, art. 9 (Sale of Deadly Weapons).

REGULATION OF TOY SPRING GUNS

(No. 8589—Commissioner of Police—O. F. W. and W. V. D.—December 12, 1934—2 pp.)

A toy gun that propels pellets or leaded shots by means of a spring comes within the provisions of section 3430 of the City Code, which relates to the selling of air rifles, air guns, toy guns, or other toy firearms.

Citations:

Ordinance: Code '31: 3430.
Other reference: Century Dictionary, "gun."

REGULATION OF SALE OF "DARTS"

(No. 7165—Commissioner of Police—F. J. B.—October 2, 1931—3 pp.)

The "dart," which consists of a piece of wood feathered at one end, at the other a piece of metal which tapers to a needle-like point, is a deadly weapon within the meaning of the city ordinances, even though it was designed for sale to children and they may not be sold except in compliance with the ordinances governing deadly weapons.

Citations:

Ordinances: Code '31: 3420-30.
Cases: People v. Sheldon, 322 Ill. 70 (1927).
People v. Clink, 216 Ill. App. 357 (1920).

REGULATION OF TEAR-GAS GUNS*

(No. 6620—*Commissioner of Police—M. H. F.—March 12, 1930—3 pp.*)

The display and sale of tear-gas guns discharged by explosion may be restricted as a "firearm" or as a "toy in the nature of a firearm" by authority of the sections of the City Code pertaining to firearms.

Citations:

Ordinances: Code '22: 1265 (as amended), 1266-72.

Other references: 6 Century Dictionary "toy."
Webster's Dictionary "toy."

FLYING SCHOOLS

(No. 7251—*S. A. M.—November 4, 1931—2½ pp.*)

The city has no power to regulate either ground or air flying schools, as this authority has never been delegated to it.

Citation:

Statute: Ill. Laws (1931), p. 194.

**TRANSPORTATION OF GARBAGE FUEL—DENIAL OF
DUMPING PERMIT**

(No. 7732—*President, Board of Health—L. H.—August 24, 1932—3½ pp.*)

The president of the Board of Health may prohibit the transport and delivery of "garbage fuel" if it is offensive to the senses so as to affect the public, but if it is handled with a reasonable degree of care so as not to become offensive to the public, such fuel may be transported and delivered without a permit.

Where the City Council orders the refusal of a permit for dumping, the president of the Board of Health must comply with such order and disapprove the application for a permit.

Citation:

Ordinance: Code '31, sec. 2429.

FURNISHING OF HEAT AND WATER BY LANDLORD

(No. 7946—*President, Board of Health—C. N.—February 16, 1933—3 pp.*)

Any landlord who fails to provide heat or water in the manner prescribed in pertinent city ordinances violates the law notwithstanding that the tenant has failed to pay his rent.

Citations:

Ordinances: Code '31: 1444, 2222.

*See also Opinion No. 8070, p. 520, on tear gas explosives.

STERILIZATION OF ICE CREAM FREEZERS

(No. 7612—*President, Board of Health—M. H. F.—June 16, 1932—2 pp.*)

Ice cream freezers and containers used in ice cream factories must be sterilized with both boiling water and live steam, but counter ice cream freezers used in small stores that manufacture ice cream on their premises need be sterilized with only one, either boiling water or live steam.

Citations:

Ordinances: Code '31: 3035(f), 3079.

REGULATION OF LOAN AGENCIES

(No. 7160—*Superintendent, Department of License—C. J. A.—September 29, 1931—2½ pp.*)

Loan agencies cannot be brought within the present terms of the ordinance relating to pawnbrokers.

Citations:

Statute: SH '29, 107½: 1.

Case: Chicago v. Hulbert, 118 Ill. 632 (1886).

PROHIBITING SALE OF PRODUCE OF OTHER STATES IN CITY MARKET

(No. 7144—*City Comptroller—M. H. F.—September 23, 1931—2½ pp.*)

The proposed amendment to the City Code relating to the West Randolph Street Market and particularly the portions which prohibit the selling in the market of produce raised outside the State of Illinois is subject to very serious objection on the ground of violating the commerce and other clauses of the Constitution of the United States.

Citations:

Constitution: United States, art. I, sec. 8, cl. 3; art. IV, sec. 2.

Cases: Wilson v. State of Missouri, 91 U. S. 275 (1875).

Guy v. Baltimore, 100 U. S. 434 (1879).

Tiernan v. Rinker, 102 U. S. 123 (1880).

Other reference: 2 McQuillin (2nd ed.), sec. 827.

MARKET FEES FOR FARMERS OF OTHER STATES

(No. 8178—*M. H. F.—September 19, 1933—2 pp.*)

A Wisconsin farmer desiring to sell his vegetables grown on his own Wisconsin farm at any of the Chicago vegetable markets would be required to pay the established market fees. The statute exempting

farmers from the payment of those fees, if applicable only to farmers of Illinois, is of doubtful validity.

Citations:

Statute: SH '33, 5: 91.

Ordinances: Code '31: 816-840.

Case: Maralls v. Chicago, 349 Ill. 422 (1932).

PROHIBITION OF MARATHON DANCES

(No. 6961—*Chairman, Committee on Recreation and Aviation—C. J. A.—June 19, 1931—3 pp.*)

The city can prohibit "marathon" or endurance dances and exhibitions.

Citations:

Statutes: SH '29, 24: 65.40, 65.58, 65.65, 65.77.

Id., 48: 5.

Cases: City of Metropolis v. Gibbons, 334 Ill. 431 (1929).

Zanone v. Mound City, 103 Ill. 552 (1882).

Chicago v. Brownell, 146 Ill. 64 (1892).

City of Sullivan v. Cloe, 277 Ill. 56 (1917).

City of Carthage v. Carlton, 99 Ill. App. 338 (1901).

Chicago v. Green Mill Gardens, 305 Ill. 87 (1923).

POLICE REGULATION OF MARATHON DANCES

(No. 6638—*Commissioner of Police—C. J. A. and J. W. B.—April 11, 1930—7 pp.*)

Marathon dances come within the statutory definition of the crime of "riot," and those who assemble to take part in a marathon dance are guilty of unlawful assembly.

The Superintendent of Police has power to prevent and disperse an unlawful assembly.

Those in charge of a marathon dance are guilty of violating the Women's Employment act if they permit any woman to dance for more than ten hours in any twenty-four hour period.

Citations:

Statutes: Criminal Code, secs. 249, 251-253.

SH '29, 48: 121.

Case: Ritchie and Co. v. Wayman, 244 Ill. 509 (1910).

Other references: Webster's Dictionary, "violence."
Century Dictionary, "riot."

REGULATION OF WOMEN IN MARATHON DANCES

(No. 6643—*Alderman, 46th Ward—C. J. A.—April 17, 1930—3½ pp.*)

The Women's Employment act, as a health measure, is violated when women in a dance marathon are on the floor sixteen hours each day,

even though twenty minutes is allowed out of each hour for rest, and even though the women are not paid for their employment, but voluntarily take part in the marathon dance.

Every person employed is, in law, presumed to be working voluntarily.

Citations:

Statute: Women's Employment act, sec. 1.

Case: Ritchie and Co. v. Wayman, 244 Ill. 509 (1910).

Other reference: Op. Corp. Counsel (1925-26), p. 64.

WALKATHONS

(No. 7778—*Commissioner of Police—W. V. D.—October 15, 1932—4½ pp.*)

The city has the right under its police powers to prohibit walkathons.

Walkathons violate the city's ordinance and violate the state statute concerning the employment of women.

Citations:

Statute: Cah. '31, 48: 5.

Ordinance: Coun. J. (1932-33), p. 933.

Cases: Ritchie v. Wayman, 224 Ill. 530 (1906-07).

Chicago v. Bowman Dairy Co., 234 Ill. 294, 298 (1908).

Other references: Century Dictionary, "employment."

Webster's New International Dictionary, "employment."

TREE-SITTING CONTESTS

(No. 6730—*Acting Commissioner of Police—C. J. A.—July 25, 1930—2½ pp.*)

Police officers have the power to arrest any parent or guardians who permit their children to engage in tree-sitting contests.

Citation:

Statute: SH '29, 38: 95, 96, 147.

REGULATION AND INSPECTION OF MESSAGE PARLORS*

(No. 8662—*M. H. F.—February 4, 1935—2 pp.*)

Massage parlor owners are engaged in a business or occupation which, in the judgment of the City Council, requires supervision under the city's police and health powers, in order that the morals and health of the public may be preserved.

Massage parlors must be kept open for inspection by duly authorized

*See p. 535 on licensing of massage parlors and Opinion No. 8693, p. 360.

representatives of the city during all hours when these places are actually in operation or holding themselves out to serve the public.

Citation:

Ordinance: Code '31: 3298.

SEGREGATION OF SEXES IN MASSAGE PARLORS

(No. 8355—*Commissioner of Police—J. F. G.—April 4, 1934—1½ pp.*)

Massage parlor patrons of both sexes may not appear in the same room for treatment at the same time when they are not essentially clothed in ordinary wearing apparel; a covering by a sheet or blanket is not sufficient.

Citation:

Ordinance: Code '31: 3297.

SUPPRESSION OF EDITORIALS

(No. 7817—*Commissioner of Police—November 25, 1932—2 pp.*)

The police have no power to suppress an editorial, the language of which is indelicate, unless the publication constitutes such indecency as is calculated to promote the violation of the law and a general corruption of morals.

Citations:

Statute: SH '31, 38: 468.

Cases: United States v. Males, 51 Fed. 41 (1892).
United States v. Clarke, 38 Fed. 732 (1889).
Commonwealth v. Allison, 227 Mass. 57 (1917).

SUPPRESSION OF DISTRIBUTION OF OBSCENE PUBLICATIONS

(No. 7993—*Commissioner of Police—O. F. W. and W. V. D.—April 3, 1933—2½ pp.*)

The sale and distribution of a publication purporting to treat scientifically sex behavior, but which is clearly of a pornographic and obscene nature can be suppressed under state law and city ordinance.

Citations:

Statute: SH '31, 38: 468.

Ordinance: Code '31: 4223.

Cases: United States v. Moore, 188 Fed. 159 (1911).
United States v. Clarke, 38 Fed. 732 (1889).

Other reference: Century Dictionary, "indecent."

OPINION OF FOREGOING SYNOPSIS

In reply to your recent request for an opinion as to whether or not the police department can suppress the sale or distribution of the publication known as "The Master Key of Love and Psychology of Human Behavior,"

please be advised that sec. 4223 of chap. 126 of the Revised Chicago Code of 1931 provides:

"It shall be unlawful for any person to exhibit, sell or offer to sell, or circulate or distribute, any indecent or lewd book, picture or other thing whatever of an immoral or scandalous nature, or to exhibit, in any place where the same can be seen from the public highway, or in a public place frequented by children which is not connected with any art or educational exhibition, any picture representing a person in a nude state, or to exhibit or perform any indecent, immoral or lewd play or other representation, under a penalty of not less than twenty dollars nor more than one hundred dollars for each offense."

Sec. 468 of chap. 38 of Smith-Hurd's Illinois Revised Statutes of 1931 declares it to be unlawful to sell or give away or have in his possession with or without intent to sell or give away any obscene or indecent book, pamphlet, paper, drawing, lithograph, engraving, etc., and provides that any one violating said section shall be confined in the county jail not more than six months or be fined not less than \$100 or more than \$1,000 for each offense.

The word "obscene" when used as in the statute to describe the character of a book, pamphlet or paper means "containing immodest and indecent matter, the reading whereof would have a tendency to deprave and corrupt the minds of those into whose hands the publication might fall whose minds are open to such immoral influences."—United States v. Moore, 126 Fed. 159; United States v. Clarke, 38 Fed. 732.

The Century Dictionary defines "indecent" as that which is obscene or grossly vulgar, unbecoming, unseemly, violating propriety of language and behavior, etc.

The publication in general deals with the relation of the sexes which would not be objectionable if treated from a scientific or medical viewpoint. But the information is of doubtful scientific or medical value. While many of the subjects discussed and manner of discussion would not constitute obscenity and indecency in a technical or legal sense, nevertheless the manner of the compilation of the publication with prominent and gross captions over articles so phrased and arranged as to stress the scurrilous and salacious nature of the contents, indicates a design to cater to the desire for pornographic or obscene literature.

The manner in which the book was written clearly indicates that it was not written for the purpose of imparting scientific knowledge.

While as a general rule the courts have looked with disfavor upon all laws attempting to limit or restrict the freedom of the press, the publication in question transcends and breaches the liberty of the press guaranteed by the constitution of the state. In our opinion it comes within the class prohibited by sec. 4223 of chap. 126 of the Revised Chicago Code of 1931 and sec. 468 of chap. 38 of Smith-Hurd's Illinois Revised Statutes of 1931.

PROHIBITION OR SALE OF OBSCENE PUBLICATIONS

(No. 6892—Acting Commissioner of Police—M. H. F. and C. J. A.—May 4, 1931—3 pp.)

The Police Commissioner can suppress the sale of books, pamphlets or literature of a lewd, obscene, lascivious or indecent character or

where pretense or artifice is used to convey the impression that they are of such a character.

Citations:

Statute: SH '29, 38: 468.

Ordinance: Code '22: 2669.

WHAT CONSTITUTES OBSCENE PUBLICATIONS

(No. 7713—*Commissioner of Police—W. V. D.—August 12, 1932—*
2½ pp.)

Although the mere printing of news concerning sexual immorality, perversion and depravity does not constitute obscenity or indecency in the technical or legal sense, the collection of them in one publication with prominent captions over the articles so phrased and arranged as to stress the scurrilous and salacious nature of the contents indicates a design to cater to the desire for pornographic or obscene literature and such publication is obscene literature which may not lawfully be sold or given away.

Citations:

Statute: SH '31, 38: 468.

Ordinance: Code '31: 4223.

Cases: United States v. Moore, 126 Fed. 159 (1904).

United States v. Clarke, 38 Fed. 732 (1889).

Other reference: Century Dictionary, "obscene."

PICKETING

(No. 7266—*Commissioner of Police—C. J. A.—November 6, 1931—*
1½ pp.)

Police should only interfere with picketing when it results in a disturbance of the public peace.

Picketing, so long as it is peaceful, is not unlawful.

Citations:

Cases: Barnes v. Typographical Union, 232 Ill. 424 (1908).

Illinois Malleable Iron Co. v. Michalek, 279 Ill. 221 (1917).

Lyon and Healy v. Piano Workers' Union, 289 Ill. 176 (1920).

Casey v. Retail Clerks' Union, 326 Ill. 405 (1928).

STOPPING PICKETING

(No. 8940—*Commissioner of Police—C. P. H. and W. V. D.—November 21, 1935—3½ pp.*)

The police may, in the exercise of their best judgment, stop the picketing of the Italian Consulate by Ethiopian sympathizers to pre-

vent a breach of peace or annoyance or disturbance of the people. It is not necessary for them to wait until an overt act is committed.

Citations:

Statutes: ISBS '35, 38; 543, 679.

Id., 22: 58.

Ordinance: Code '31: 4210.

Case: Barnes v. Typographical Union, 232 Ill. 424 (1908).

PHRENOLOGY

(No. 6796—*Acting Commissioner of Police—M. H. F.—November 6, 1930—1½ pp.*)

The practice of phrenology is legal.

Citation:

Reference: Op. Corp. Counsel (1916-19), p. 790.

REGULATION OF PHRENOLOGY

(No. 6979—*F. J. B.—July 1, 1931—1½ pp.*)

Phrenology is not regulated within the city by any ordinance or statute, unless it amounts to fortune telling which is forbidden by law.

Citations:

Statutes: SH '29, 38: 290, 291.

Ordinances: Code '22: 26, 29.

Other reference: Op. Corp. Counsel (1916-19), p. 790.

ABATEMENT OF HOUSE OF PROSTITUTION*

(No. 8359—*State's Attorney—O. F. W.—April 7, 1934—2 pp.*)

The statute with regard to enjoining the maintenance of a house of prostitution specifically names the "State's Attorney or any citizen of the county" as the parties to institute the necessary proceedings to abate this nuisance and such specific provisions exclude all others, such as a municipal corporation, from using the remedy described.

Citation:

Statute: SH '33, 100½: 12.

ABATEMENT OF PREMISES USED FOR PROSTITUTION OR LIQUOR SALES

(No. 7278—*Commissioner of Police—W. V. D.—November 9, 1931—1½ pp.*)

Proceedings to abate a public nuisance can be instituted against a hotel if there is any evidence shown that the hotel has been used

*See also annotation "Disorderly houses," p. 425.

for purposes of lewdness, assignation or prostitution, or for purposes of manufacturing, selling, keeping or bartering intoxicating liquor.

While abatement proceedings are usually instituted by the State's Attorney, they can also be begun by the city's Law Department.

Citation:

Statute: SH '29, 43: 21.

REGULATING INSTALLATION AND REPAIR OF REFRIGERATORS

(No. 8823a—Mayor—J. F. G.—July 20, 1935—2 pp.)

In the absence of an express grant of power, the city has no authority to establish a board to examine persons engaged in the business of installing or repairing refrigerating systems, nor to require these persons to submit to an examination and to secure a registration certificate.

Nor is there express authority for the city to license persons engaged in the above business.

REGULATIONS REGARDING SCHOOL CHILDREN ABSENT DUE TO ILLNESS

(No. 7334—Commissioner of Health—C. J. A.—December 1, 1931—4½ pp.)

The Health Department and the Board of Education, acting in cooperation, have the power to require public school children, who have been absent from school on account of illness, either to furnish a physician's certificate or to submit to an examination, and, in default thereof, can exclude them temporarily from school.

It is believed that these arrangements can be made by the Department of Health with the authorities of parochial or other private schools, but, in the absence of a threatened epidemic, the department cannot interfere without the consent of these authorities.

Citations:

Statute: SH '31, 24: 65.77.

Cases: *People v. Robertson*, 302 Ill. 422 (1922).
Lawbaugh v. Board of Education, 177 Ill. 572 (1898-99).
Burroughs v. Mortenson, 312 Ill. 163 (1924).
Hagler v. Larner, 284 Ill. 547 (1918).
Gundling v. Chicago, 176 Ill. 340 (1898).
Chicago v. Drogasawacz, 256 Ill. 34 (1912-13).
Kay v. Chicago, 263 Ill. 122 (1914).

REGULATION OF SECOND-HAND DEALERS*

(No. 7618—*Mayor—C. J. A.—June 21, 1932—2½ pp.*)

The City Council has the power to enact an ordinance regulating second-hand stores and to compel them to keep a record of the source from which they purchase goods.

The present pawnbroker ordinance is not applicable to second-hand dealers.

Citations:

Statute: SH '31, 24: 65.95.

Cases: Chicago v. Adelman, 326 Ill. 58 (1928).

Chicago v. Lowenthal, 242 Ill. 402 (1909).

Smolensky v. Chicago, 282 Ill. 131 (1918).

VIOLATION OF SMOKE ABATEMENT ORDINANCE†

(No. 6535—*Deputy Smoke Inspector in Charge—M. H. F.—November 1, 1929—4 pp.*)

If the Department of Smoke Inspection and Abatement is organized in accordance with the provisions of the smoke abatement ordinance, it may properly prosecute the engineers and firemen in charge of the operation of the boiler plants of municipally owned buildings violating this ordinance.

Citations:

Ordinance: Coun. J. Dec. 19, 1928, as amended Dec. 31, 1928, secs. 1, 2, 3, 9, 10.

Other reference: Op. Corp. Counsel (1897-1905), p. 740.

INSTALLATION OF FIRE SPRINKLER SYSTEMS

(No. 6518—*Division Marshal in Charge of Fire Prevention—F. J. C.—October 2, 1929—4 pp.*)

A building remodeled and changed from a theater to a Class I occupancy subsequent to the passage of the Fire Prevention ordinance, is not required to install a sprinkler system, as this provision of the ordinance applies only to buildings erected after its passage.

Citations:

Ordinances: Code '22: 1291, 1297.

Street Vending: "Pulling" and "street hawking" in the Halsted-Roosevelt district was declared a nuisance and enjoined. Secs. 1008 and 1009 of the Revised Code declare such practices to be unlawful.—Edelman Bros. v. Baikoff, 277 Ill. App. 432 (1934).

*See also Opinion No. 7471 and annotations, p. 529, on junk stores and dealers.

†See also p. 135.

REGULATION OF TAXI FARES*

(No. 8398—*J. F. G.*—May 18, 1934—2½ pp.)

The City Council may establish either a fixed rate of fare or maximum or minimum rates for taxicab operation.

Citations:

Statute: Cities and Villages act, art. V, sec. 42.

Cases: Clem v. City of La Grange, 149 S. E. 638 (Ga. 1929).

Public Service Commission of Montana v. Great Northern Utilities Co., 289 U. S. 130 (1932).

City of Seymour v. Texas Electric Service Co., 66 F. (2nd), 814 (1933).

AMOUNT OF TAXICAB FARES BY METER

(No. 8120—*Commissioner of Police—J. F. G.*—July 17, 1933—2½ pp.)

The operation of taxicabs with taximeters indicating fares based on rates in excess of those prescribed in the city ordinances is illegal.

Citations:

Ordinances: Code '31: 2118-19, 2125 (as amended by Coun. J. 1933-34, p. 641).

OPERATION OF TAXICAB METERS

(No. 7707—*City Sealer—C. J. A.*—August 10, 1932—3½ pp.)

As the taxicab meter ordinance allows a charge "for each three minutes of waiting or fraction thereof," taxicab meters may lawfully start to register such waiting charge at the end of the first minute and a half.

Citation:

Ordinance: Code '31: 2125.

INSPECTION OF THEATERS BY FIRE DEPARTMENT

(No. 7096—*Division Marshal in Charge of Fire Prevention—M. J. F.*—August 28, 1931—4 pp.)

Any refusal of permission to the Division Marshal in charge of Fire Prevention or his duly authorized representatives to inspect all portions of theaters is a violation of the City Code and subjects these violators to penalty upon proper filing of a complaint.

Citations:

Ordinances: Code '22: 1322-24.

Code '31: 2510-12.

*See also opinions, p. 481, on taxicab regulation.

REGULATION OF THEATER LOBBIES

(No. 6525—*Fire Commissioner—F. J. C.—October 15, 1929—4 pp.*)

The dividing off of a space of a theater lobby by dividing rails to meet the exit requirements of the fire prevention ordinance is a violation of the ordinance.

The words "foyer" and "lobby" as used in the fire prevention ordinance are synonymous, meaning a public room at or near entrance of a theater.

Citations:

Ordinances: Code '22: 496, 582, 595, 615, 617, 1344-47, 1363, 1369.

Other reference: Op. Corp. Counsel (1925-26), p. 611.

**LIABILITY FOR PARTNER'S ACTS IN UNDERTAKING
BUSINESS***

(No. 8159—*President, Board of Health—B. J. K.—August 29, 1933—1½ pp.*)

In a partnership, so far as the conduct of the business requires the observance of rules designed for the public health, as in the undertaking business, each partner is bound by the acts of the other since a duty to the public is a joint obligation of both.

RECORD REQUIREMENTS OF USED CAR COMPANY

(No. 8654—*M. H. F.—January 28, 1935—2½ pp.*)

Where a company purchases, rebuilds or sells armatures that are parts of used motor vehicles, it is subject to the record keeping requirements of the State Auto Anti-Theft act.

Citations:

Statutes: SH '33, 121: 256.1-256.20.

**POWERS OF BOARD OF HEALTH AND SCHOOL BOARD
TO VACCINATE**

(No. 6852—*Mayor—C. J. A.—March 25, 1931—4½ pp.*)

The Board of Health has no authority to compel any person to submit to vaccination or to the injection of any virus or medication against his will or without his consent, or in case of a minor or other person under disability, without the consent of the parent, guardian or conservator.

*See also opinions, pp. 544-548, on licensing undertakers.

The School Board has the power in case of epidemic, to require a child to be vaccinated if he wishes to continue to attend school.

Citations:

Ordinance: Code '22: 1781, as amended.

Cases: Potts v. Breen, 167 Ill. 67 (1897).

People v. Board of Education, 234 Ill. 422 (1908).

Lawbaugh v. Board of Education, 177 Ill. 572 (1898-9).

People v. Robertson, 302 Ill. 422 (1922).

Burroughs v. Mortenson, 312 Ill. 165 (1924).

DISTRIBUTION OF BOOKLET ON VENEREAL DISEASES*

(No. 7826—*Commissioner of Police*—W. V. D.—December 1, 1932—2 pp.)

The distribution on the city's streets of a booklet purporting to describe venereal diseases and their treatment, and giving information as to where treatment may be obtained violates the City Code.

Citation:

Ordinance: Code '31: 4226-27.

BOARD OF HEALTH, EXAMINATION OF PRISONERS FOR VENEREAL DISEASE

(No. 7093—*Commissioner of Health*—C. J. A.—August 26, 1931—10 pp.)

The Health Department probably does not have the power to compel prisoners, without their consent, to submit to physical examination for venereal diseases except where the Health Department already has some tangible evidence that they are afflicted therewith or where, as in the case of common prostitutes, there is a fair presumption they are so afflicted.

Citations:

Administrative rules: Illinois Department of Public Health, Rules 19, 24.

Cases: Rock v. Carney, 185 N. W. 798.

Ex parte Arato, 198 Pac. 814.

Wragg v. Griffin, 185 Iowa 243, 170 N. W. 400.

Ex parte Shepard, 195 Pac. 1077.

Ex parte Dayton, 199 Pac. 548.

State v. Newcomb, 220 Mo. 54.

State v. Horton, 247 Mo. 657.

State v. Superior Court, 103 Wash. 409.

Other references: 29 CJ 254.

Op. Corp. Counsel (1924-25), p. 154.

Vivisection: An injunction was denied to restrain the city from disposing of impounded dogs for vivisection purposes or without judicial process.—Koestner v. Chicago, 278 Ill. App. 624 (1934).

The Circuit Court upheld the right of the city to dispose of dogs to universities and experimental institutions under an ordinance passed in 1931. Suit to restrain enforcement of this ordinance had been brought by the Illinois Anti-Vivisection Society and George D. Patterson. An appeal is pending.

*See also opinions, p. 416, on birth control.

CHAPTER VII

LICENSES

INTRODUCTORY

Licensing is a distinct and effective form of police regulation. It differs from other forms of regulation in that it is designed primarily to prevent rather than apprehend wrong-doing. It permits engagement in licensed activities only if certain required qualifications are met and only so long as various police regulations are obeyed. There are cases, however, where the city has been empowered by the state to license for revenue rather than for regulatory purposes.

Certain basic principles of licensing are clearly presented in this chapter. For example, the city has the power to license only as this power is expressly granted by statute or is necessarily implied as incidental to a power granted. Moreover, even though the city had no power to exact a license fee, it could not refund the fee unless it was paid under duress and protest or unless the state act empowering the city to license provides for refunds. Finally, the power to deny or revoke a license cannot be exercised arbitrarily.

Two particularly recent and outstanding subjects of licensing are motor vehicles and retail liquor dealers, especially the latter. The licensing of motor vehicles has, of course, come with the automotive era and it is designed primarily as a source of revenue for providing good roads and boulevards. Among the outstanding questions raised on this point are control of interstate commerce and exemptions. Liquor licensing is extremely recent, emerging shortly after the repeal of prohibition. It has produced many perplexing legal and administrative problems particularly on the question of denial and revocation of licenses.

Under the subtitle "Specific Subjects of License" in this chapter, will be found answers to particular questions concerning more than fifty different licensed activities ranging all the way from ambulance operation through wholesale itinerant produce dealers, thus giving an impression of the wide scope of licensing.

A. POWER TO LICENSE

(1) *Limitations*

SOURCE OF CITY'S LICENSING POWER

(No. 6850—*Secretary, Commission on Revenue—M. H. F.—March 20, 1931—2½ pp.*)

The municipalities of Illinois exercise only such powers as are expressly delegated to them by legislature or as are to be implied from the powers so granted.

The police power clause does not delegate all state police powers to cities, but only the power to pass and enforce all police ordinances that are necessary with reference to subjects and occupations, which, by other specific clauses of Cities and Villages act, cities are given express authority to regulate and control.

The city's power to license locksmiths and key makers is doubtful.

Citation:

Statute: SH '29, 24: 65.65, 65.81.

OPINION OF FOREGOING SYNOPSIS

With your communication of recent date you submitted a letter regarding the preparation of an ordinance licensing locksmiths. This communication is returned herewith. You request the advice of this department as to the power of the city to pass an enforceable ordinance licensing and restricting the making of keys.

While we can see some protection which might be afforded the general public by such an ordinance, and also some benefit that might accrue to the business of responsible locksmiths and key makers, we entertain considerable doubt as to whether an ordinance regulating and licensing this occupation would be upheld by the courts.

Before enacting an ordinance licensing an occupation, the municipality must be able to point to the authority delegated by the legislature for the enactment. Municipalities in Illinois have no inherent power to enact police regulations, and they exercise only such powers in that respect as are expressly delegated to them by the legislature and such as are necessarily implied from those granted. We have examined the statutes of Illinois and we do not find any authority expressly delegated to regulate or license the occupation of locksmiths or key makers. Clause 82 of Section 65, Article V of the Cities and Villages Act, confers power to regulate the use of machine shops, but in our opinion a key maker's or locksmith's establishment is so different from a machine shop, as the latter term is generally understood, that we can find little support for the ordinance in this section.

In the absence of authority expressly delegated, we are thrown back upon Clause 66, the police power clause, which delegates to the city the power to regulate the policing of the city and to pass and enforce all necessary police ordinances. Regarding Clause 66, the Supreme Court of Illinois has held that it is not a delegation of all the state's police power, but gives

municipalities the power to pass and enforce all police ordinances necessary with reference to the subjects and occupations which, by other specific clauses of the Cities and Villages Act section, municipalities are given express authority to regulate and control.

So, as before stated, we doubt whether an ordinance licensing key makers and locksmiths would find support in the powers conferred upon the city.

CITY LICENSE AND STATE REGULATION—SECOND-HAND AUTOS

(No. 8134—Superintendent, Bureau of License—E. M. S.—August 2, 1933—2½ pp.)

The city has no power to license and regulate used car dealers, as the state has assumed control thereof.

Citations:

Statute: Ill. Laws (1933), p. 969.

Ordinance: Code '31: 3684.

Cases: Wilkie v. Chicago, 188 Ill. 444 (1900-01).

Chicago v. Moore, 351 Ill. 510 (1933).

Opinion No. 8166 of September 5, 1933, to the Commissioner of Police and Opinion No. 8311 of February 21, 1934, to the Superintendent, Bureau of License Enforcement is in accord with the above opinion.

Licensing of Used Car Dealers: The Illinois Motor Anti-Theft act was amended in 1935 to authorize the city to license and regulate used car dealers.—Ill. Laws (1935), p. 1239.

LICENSING SOLELY FOR REVENUE

(No. 7538—Commissioner of Police—M. H. F.—April 11, 1932—1½ pp.)

An ordinance licensing coal dealers solely for revenue purposes is invalid.

Sec. 3345 of the Chicago Code, reading the same as it did in 1924, when it was declared invalid, cannot be enforced.

Citations:

Ordinance: Code '31: 3345.

Case: Aberdeen-Franklin Coal Co. v. Chicago, 315 Ill. 99 (1925).

Other reference: Opinion No. 7488 (this volume, p. 514).

DISCRIMINATION IN LICENSING

(No. 7957—Alderman, 32nd Ward—G. T.—February 24, 1933—2 pp.)

An ordinance to charge large dealers greater license fees than small dealers and to license persons soliciting business in the city for outside dealers would be invalid because it discriminates between persons

in the same class of business and denies equal protection of the laws and because the city is not empowered to license solicitors.

Citations:

Statute: Cah. '31, 24: 65 (41).

Cases: *Berger v. Pennsylvania R. R.*, 27 R. I. 583, 65 Atl. 251 (1906).
Bruner v. Kansas Moline Plow Co., 168 Fed. 218 (1909).

LICENSE EXEMPTION FOR VETERANS

(No. 7805—*W. V. D.*—November 10, 1932—2 pp.)

Any ordinance or statute which grants ex-service men the right to vend and hawk novelties on the streets of the city without a license violates both the Federal and State Constitution.

Citations:

Constitution: United States, XIV amendment.
 Illinois, art. IV, sec. 22.

Statutes: Cah. 31, 24: 626, 627.

Ordinance: Code '31: 3578.

Cases: *Marallis v. Chicago*, 349 Ill. 422 (1932).
State v. Shedrai, 35 Vt. 277 (1861).
State v. Whitcom, 122 Wis. 110 (1904).

Opinions No. 7361 of December 9, 1931, to the Commissioner of Police and No. 7638 of July 6, 1932, to the City Council, are in accord with the above opinion.

LICENSING PERMANENT USE OF STREET—DENYING LICENSE

(No. 8381—*Chairman, Subcommittee on Ice Cream*—*E. R. D.*—May 8, 1934—4 pp.)

The city has no right to issue a permit to any person whose business is of the nature of peddling by wagon or other vehicle, to occupy permanently any portion of the city streets; nor has the city the right to deny a peddler's license to such person when he strictly adheres to the ordinances.

The Mayor may grant a temporary permit to a peddler who proves his poverty and his inability to pay a peddler's license fee.

A permanent encroachment upon the streets for private use is legally a nuisance.

Citations:

Statute: Cities and Villages act, art. V, sec. 10.

Ordinances: Code '31: 3575, 3577.

Cases: *Hibbard and Co. v. Chicago*, 173 Ill. 91 (1898).
People v. Corn Products Co., 286 Ill. 226 (1919).
People v. Wolper, 350 Ill. 461 (1933).

LICENSE EXEMPTIONS OF FOREIGN REPRESENTATIVES

(No. 7919—*Vice Consul of Ecuador—M. H. F.—January 28, 1933—1½ pp.*)

The Mayor is authorized, by ordinance, to exempt all foreign consuls or other authorized representatives of any foreign government within the city from the payment of any license fee provided by any city ordinance.

Citation:

Ordinance: Code '31: 2073.

PRIVILEGES AND IMMUNITIES OF FOREIGN CONSULS

(No. 8461—*City Solicitor, Edmonton, Alberta—C. N.—July 10, 1934—2½ pp.*)

Foreign consuls in the United States in their private capacity are entitled to no immunities beyond those enjoyed by any other foreigners in this country, except that of suing and being sued exclusively in the federal courts. Such consuls must look for protection of their personal and property rights to the laws of the state in which they reside.

A foreign consul, resident in Chicago, has no privilege of immunity from the payment of a dog tax or license fee exacted by the city.

Citations:

References: 2 Op. U. S. Atty. Gen. 725 (1835).
19 Op. U. S. Atty. Gen. 16 (1887).
Op. Corp. Counsel (1920-23), p. 565.

ISSUANCE OF LICENSE EMBLEMS TO POLISH CONSULATE

(No. 8628—*City Collector—M. H. F.—January 15, 1935—1½ pp.*)

The City Collector may issue without charge vehicle license emblems to the resident officials of the Polish Consulate General, on receipt of a communication from the Consul General that these officials are nationals of Poland and are not engaged in private occupations of gain within the United States.

Citation:

Ordinance: Code '31: 2073, as amended, Coun. J. (1931-32), p. 1842.

FREE ISSUANCE OF LICENSE TO ROUMANIAN VICE-CONSUL

(No. 8208—Mayor—M. H. F.—November 13, 1933—2 pp.)

A dog license may be issued without any charge to the Roumanian Vice-Consul, if he is a citizen of Roumania.

Citations:

Ordinances: Code '31: 2073.

Coun. J. (1931-32), p. 1842.

*(2) Specific Activities***CANVASSERS**

(No. 6578—Commissioner of Police—M. H. F.—January 2, 1930—3½ pp.)

The city has no power to require canvassers to be licensed and to carry with them photographic identification cards as this power has not been delegated by the state legislature.

Citations:

Statute: Cities and Villages act, art. 5, sec. 1 (42).

Cases: Barnard and Miller v. Chicago, 316 Ill. 519.

Chicago v. Northern Paper Co., 337 Ill. 194 (1930).

Arms v. Chicago, 314 Ill. 316 (1925).

Chicago Motor Coach Co. v. Chicago, 337 Ill. 200 (1930).

Chicago v. P. F. Pettibone & Co., 267 Ill. 573 (1915).

Chicago v. Murphy, 313 Ill. 98 (1925).

Chicago v. M. & M. Hotel Co., 248 Ill. 264 (1911).

People v. Chicago, 261 Ill. 16 (1913-14).

Emmons v. City of Lewiston, 132 Ill. 380 (1889-1890).

Rawlings v. Cerro Gordo, 135 Ill. 36 (1890-91).

People v. Dreher, 302 Ill. 50 (1922).

Other reference: "Words and Phrases" definition of "canvasser."

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your communication which forwards a letter * * *.

It suggests the drafting and passage of an ordinance for the licensing of canvassers, in and by which all persons engaged as canvassers shall be required to take out and carry photograph identification cards.

We can readily see the value of such municipal regulation, the protection it would afford householders and their families, and the aid it would be to the Chicago Police Department in checking the efforts of criminals who ply their trade in the guise of house to house canvassers. It is, however, our opinion that such an ordinance would be declared invalid by the courts as beyond the power of the City Council to enact.

Unfortunately for Chicago, the city does not now have all the legislative power and authority which a city of its size and importance should possess. By the paramount state law, cities in Illinois have only such powers as are expressly delegated to them by the legislature or necessarily incident to the powers expressly granted (City of Chicago v. Northern Paper Co., 337

Ill. 194; *Barnard & Miller v. City of Chicago*, 316 *id.* 519; *Arms v. City of Chicago*, 314 *id.* 316).

By Clause 42 of Sec. 1 of Art. V of the Cities and Villages act (Chap. 24, Smith-Hurd Ill. Rev. Stat. 1929) the city has been given express power and authority to license, tax, regulate, suppress and prohibit hawkers and peddlers, and to revoke such licenses at pleasure. The Supreme Court of Illinois has declared that statutes granting powers to municipal corporations are strictly construed, and a reasonable doubt of the existence of a power must be resolved against it. (*Chicago Motor Coach Co. v. City of Chicago*, 337 Ill. 200); that the enumeration of the subjects with reference to which the police power may be exercised excludes all others (*City of Chicago v. P. F. Pettibone & Co.*, 267 Ill. 573; *Lowenthal v. City of Chicago*, 313 *id.* 190; *City of Chicago v. Murphy*, 313 *id.* 98; *Arms v. City of Chicago*, *supra*; *City of Chicago v. Ross*, 257 *id.* 76; *City of Chicago v. M. & M. Hotel Co.*, 248 *id.* 264; *People v. City of Chicago*, 261 *id.* 16; *People v. Dreher*, 302 *id.* 50); also that the city may not extend its power by a mere definition contained in an ordinance (*Emmons v. City of Lewiston*, 132 Ill. 380).

Words and Phrases Judicially Defined defines canvasser as "a traveling salesman who goes out on the road soliciting orders for his house, and taking with him samples of the goods or wares his house deals in." The *Century Dictionary* defines the term as "one who solicits votes, mercantile orders, etc."

The Supreme Court of Illinois has also held that a person soliciting orders from house to house is not a "hawker" or "peddler" as those terms are used in the Cities and Villages act (*Emmons v. Lewiston*, *supra*; *Rawlings v. Village of Cerro Gordo*, 135 Ill. 36). It therefore seems probable that were the City Council to enlarge by amendment its present ordinance regulating peddlers to cover canvassers, or pass a new ordinance attempting to license and regulate canvassers, that such legislation would be declared invalid by the courts.

CHAIN STORES

(No. 7627—*Secretary, Commission on Revenue—M. H. F.—June 28, 1932—2 pp.*)

The city has no power, either expressly or by implication, to license chain stores.

Any attempt to enact an ordinance taxing chain stores might subject other licensing ordinances of the city, as well as the proposed new ordinance, to attack upon the ground of double taxation.

An ordinance taxing chain stores would probably be upheld if the legislature gave the city specific power to pass such an ordinance.

Citation:

Case: *State Board of Tax Commissioners v. Jackson*, 283 U. S. 527 (1930).

MINIATURE GOLF COURSES

(No. 6780—*C. J. A.—October 28, 1930—3 pp.*)

It is doubtful whether the City Council could lawfully provide for the licensing of miniature golf courses as the existing zoning ordi-

nance classifies golf courses as a "residence use." Even if miniature golf courses were reclassified as a "commercial use," the city may not be able to license them since the Illinois Supreme Court has held that municipalities may not license ordinary golf courses.

Citation:

Case: *Condon v. Village of Forest Park*, 278 Ill. 218, 215 N. E. 825 (1917).

PRIVATE NIGHT WATCH AND PATROL AGENCIES

(No. 8775—*Alderman, 44th Ward—M. H. F.—May 24, 1935—5½ pp.*)

The city does not have the power to license private night watch and patrol agencies.

Citations:

Statutes: SH '33, 24: 68, 91.

Id., 38: 608(b)-608(c).

Cases: *Wilkie v. Chicago*, 188 Ill. 444 (1900-01).

Chicago v. Jensen, 331 Ill. 129 (1928).

Other reference: Opinion No. 8254 (this volume, p. 379).

SALE OF ELECTRICAL DEVICES*

(No. 7513—*Commissioner of Gas and Electricity—W. L. S.—March 28, 1932—3½ pp.*)

The licensing of all places selling electrical devices or contrivances would seem to be the remedy for preventing the sale of sub-standard electrical appliances, but the power of the city to do so is doubtful.

Citation:

Ordinance: Code '31: 1810-15.

RADIO ADVERTISING FROM VEHICLES

(No. 7426—*Secretary, Commission on Revenue—C. J. A.—January 20, 1932—5½ pp.*)

The City Council has power to license and regulate advertising on public streets by radio from vehicles, but any ordinance to that effect, in order to be valid, must be reasonable and must not unduly discriminate between persons similarly situated.

Citations:

Statute: SH '31, 24: 65.16, 65.17, 65.65.

Cases: *People v. Clean Street Company*, 225 Ill. 470 (1907).

Biffer v. Chicago, 278 Ill. 562 (1917).

City of Elgin v. Winchester, 300 Ill. 214 (1922).

Chicago v. Schultz, 341 Ill. 208 (1931).

People v. Thompson, 341 Ill. 166 (1931).

Other reference: *Cooley, Taxation* (3rd ed.), p. 1133.

*See also Opinion No. 7818, p. 427.

STAGE FIREMEN AND FIRE GUARDS

(No. 7413—*Chairman, Committee on Judiciary and State Legislation—M. H. F.—January 12, 1932—3½ pp.*)

A proposed ordinance amendment requiring that special stage firemen and fire guards at theatres be examined and licensed, and charging a nominal fee for the examination and license would be valid.

Citations:

Ordinances: Code '31: 2510.
Code '22: 1324.

LIFE INSURANCE BROKERS*

(No. 6729—*Superintendent, Department of License—M. H. F.—July 25, 1930—5 pp.*)

The city has a right to license life insurance brokers and to collect license fees from them, since power is given to the city to regulate and license brokers and no state law provides for the licensing of life insurance brokers. An insurance agent, however, does not come within the terms of the broker's licensing ordinance and should be distinguished from a broker.

Citations:

Constitution: Illinois, art. IX, sec. 1.
Statutes: SH '29, 24: 65.90.
Id. 24: 73.
Ordinance: Code '22, ch. 16.
Cases: Brown v. Chicago, 110 Ill. 186 (1884).
Banta v. Chicago, 172 Ill. 204 (1898).
City of East St. Louis v. Brenner, 59 Ill. App. 604 (1894-95).
McKinney v. City of Alton, 41 Ill. App. 508 (1891-92).
Linehan v. Chicago, 227 Ill. App. 225 (1934).
Other reference: 9 CJ 509, 510.

PIN GAMES

(No. 7364—*Chairman, Committee on Parks, Playgrounds, Aviation and Athletics—C. J. A.—December 10, 1931—3 pp.*)

The City Council has the authority to license pin games, such as, "Hoot Mon Golf," and "Whoopee," which are placed in hotel lobbies and stores.

Citations:

Statute: SH '31, 24: 65.40, 65.43.
Case: Village of Atwood v. Otter, 296 Ill. 70 (1921).

*See also Opinion No. 7100, p. 511.

"SWEAT SHOPS"

(No. 6589—*Secretary, Commission on Revenue—L. H.—January 20, 1930—2 pp.*)

The city probably could regulate and license so-called "sweat shops" in which the making of clothes is carried on in houses or apartments that have living rooms connected with the workrooms.

Citations:

Ordinance: Code '22: 2468 (Wearing apparel shops license ord.).

Case: *Nature's Rival Co. v. Chicago*, 324 Ill. 566 (1927).

B. ADMINISTRATION OF LICENSING*(1) Issuance and Enforcement****ISSUANCE OF LICENSE TO DEBTORS OF THE CITY**

(No. 7052—*City Collector—L. H.—August 3, 1931—3½ pp.*)

The City Collector may not issue a license to any person until he pays all past debts due the city, unless he is specially authorized by the City Council to issue it.

ISSUANCE OF LICENSE IN VIOLATION OF ORDINANCE

(No. 7198—*Commissioner of Health—W. L. S.—October 20, 1931—8 pp.*)

A Council order cannot amend an ordinance, and where the purpose of the order is to cause the issuance of a license or a permit in violation of the terms of an ordinance, such order is void and of no effect. Therefore, the Commissioner of Health should not issue licenses for new laundries in tenement houses upon Council orders, as the issuance of such licenses is in contravention of the terms of the ordinance prohibiting new laundries from being established in any tenement house.

Citations:

Ordinance: Code '31: 3534.

Cases: *Ruban v. Chicago*, 330 Ill. 97 (1928).

People v. Thompson, 209 Ill. App. 573 (1918).

Other reference: Webster's Dictionary, "tenement house."

*See Opinion No. 7940, p. 521, on compliance with zoning ordinance before license is issued.

ISSUANCE OF TEMPORARY LICENSE TO NON-CONFORMING USE

(No. 7053—Alderman, 32nd Ward—L. H.—August 3, 1931—2 pp.)

The issuance of a temporary license to operate a bakery in a residential zoned district is void and conferred no rights on the licensee as a bakery is a non-conforming use in a residence district.

Citation:

Case: *Meltzer v. Chicago*, 152 Ill. App. 334 (1894).

ISSUANCE OF COPY OF LOST OR STOLEN LICENSE

(No. 7628—City Clerk—C. J. A.—June 29, 1932—2½ pp.)

The person to whom a license is issued should be recognized as the holder of it, no matter who pays for it, and if it is lost or stolen, the person to whom it was issued is entitled, upon proper application, to a certified copy of it.

The city is not compelled to rely wholly upon the statements or affidavit of an applicant that his license has been lost, and may make its own independent investigation.

DISTRESS SALE LICENSE WHERE APPLICANT HAS SEVERAL STORES*

(No. 7869—City Collector—M. H. F.—December 29, 1932—2 pp.)

Where one company owns several stores, by state law a separate distress license for a sale is necessary for each store or place where such sale is proposed to be conducted.

A license to conduct a business which has a situs or to operate an establishment which has a fixed location is a privilege to conduct business at the single place stated in the application.

Citation:

Statute: SH '31, 121½: 149 (Prevention of Fraudulent Sale act).

LICENSE WHEN AUTO SALESROOM AND REPAIR SHOP SEPARATE

(No. 7023—Acting Commissioner of Police—F. J. B.—July 22, 1931—3½ pp.)

A person conducting an auto salesroom and an auto repair shop as distinct units on premises separate and apart from one another must obtain a separate license for each unit.

Citations:

Ordinances: Code '22: 268, 269, 272, 274, 276, 281.
Code '31: 3257-72.

*See also Opinion No. 8231, p. 512.

LICENSE WHEN FOUNDRY AND MACHINE SHOP ON SAME PREMISES

(No. 8103—Superintendent, Bureau of License—M. H. F.—June 24, 1933—3½ pp.)

A factory which conducts a foundry and a machine shop on the same premises must obtain separate licenses for the foundry and the machine shop.

Citations:

Ordinances: Code '31: 3013, 3015, 3834(a), 3835.

LICENSE REVOCATION FOR NON-PAYMENT OF PRIVATE DEBT

(No. 8600—C. N.—December 26, 1934—1½ pp.)

The Mayor has no power to revoke the license of a retail tobacco dealer for the non-payment of a private debt in which the city has no interest.

Public officers cannot devote the facilities of their offices to the collection of private debts.

Citations:

Ordinances: Code '31: 3787-3792.

Case: Merwin v. Chicago, 40 Ill. 133 (1863-66).

Bureau of License: The Bureau of License was established under the jurisdiction of the City Comptroller and the Department of License was abolished. Such bureau shall enforce all license ordinances.—Coun. J. (1933-34), p. 1669.

ENFORCEMENT OF LICENSING REGULATIONS—PART PAYMENT OF FEES

(No. 7856—City Collector—L. H.—December 27, 1932—8½ pp.)

Where the city has the power to suppress or prohibit a business, it has power not only to license but also to forbid all unlicensed persons from carrying on such business.

To prevent unlicensed persons from carrying on a business in violation of an ordinance requiring a license, the city may prosecute day to day for the ordinance violation, or may procure an injunction restraining such operation and may, if all other means fail, even forcibly prevent the business being carried on through its Police Department; however, this latter remedy is drastic and may not be lawful as to business which cannot be prohibited.

Revocation of a license for the main business as a restaurant is a

lawful way of compelling a person to obtain a license for his lesser business, *i. e.*, the sale of cigarettes. The city's officers, in the absence of a special showing, should not accept a partial payment of a license fee. Unless special conditions exist, the City Collector may ignore an agreement by the License Bureau to accept part payment of a license fee.

Citation:

Case: *Haggenjos v. Chicago*, 336 Ill. 573 (1930).

Opinion No. 7467 of December 27, 1932, to the City Collector is in accord with the above opinion.

EFFECT OF INJUNCTION ON ISSUANCE OF LICENSE

(No. 7609—*Commissioner of Police—W. V. D.—June 15, 1932—1 p.*)

An injunction restraining the use of certain premises does not restrain the city from issuing a fifth-class amusement license for those premises, nor would the licensee be able to enjoy the privileges conferred by the license.

POLICE ENTRY TO ENFORCE LICENSE ORDINANCES

(No. 7087—*Commissioner of Gas and Electricity—L. H.—August 23, 1931—2½ pp.*)

The police have a right of entry at any time to any place of business for which a license is required to ascertain whether the license ordinance has been complied with. They may arrest persons violating licensing ordinances. A complaint should be sworn out by the arresting officer or member of any proper department immediately after such arrest.

Citations:

Ordinances: Code '31: 1824, 2917.

PENALTIES FOR OPERATION WITHOUT LICENSE

(No. 8013—*City Collector—O. F. W. and W. V. D.—April 11, 1933—1½ pp.*)

After the period for which license fees are payable has lapsed, a person who has failed to take out a required license does not become indebted to city for the amount of license, nor can he be compelled to take out the license. However, a person who operated without a license may incur penalties provided by the ordinance.

Where a penalty is imposed, and the ordinance does not provide the

mode of procedure for the recovery, an action of debt is a proper remedy.

The Mayor may refuse to issue a license to a person who has wilfully evaded the provisions of the licensing ordinance.

Citations:

- Cases: *People v. Swift*, 66 Ill. App. 605 (1895-96).
Chicago v. Enright, 27 Ill. App. 559 (1889).
Durbin v. People, 54 Ill. App. 101 (1893-94).

EFFECT OF APPEAL FROM WRIT ORDERING LICENSE RENEWAL

(No. 8030—*Commissioner of Police—O. F. W. and W. V. D.—April 25, 1933—3 pp.*)

When an operator of a public place of amusement has obtained a writ ordering the city to renew his license, and when the city has appealed from that writ, the Police Department may refuse to permit him to operate his place until he obtains a license.

The courts have no power to interfere with the exercise of police powers given by law to the city's officers, nor do they have jurisdiction to interfere with the public duties of any department of the city.

An appeal from an order granting a writ of mandamus operates as a supersedeas and stays all proceedings to enforce the judgment or decree pending the appeal.

Citations:

- Cases: *Tholming v. Hawkins*, 294 Ill. 30 (1920).
Cowan v. Curran, 216 Ill. 598 (1905).
People v. David, 328 Ill. 230 (1928).
Hohenadel v. Steele, 237 Ill. 229 (1908-09).
Rockford Amusement and Refreshment Co. v. Baldwin, 252 Ill. App. 1 (1929).
Tiffany Productions, Inc. v. Russell, 257 Ill. App. 591 (1930).
Chicago Public Stock Exchange v. McClaughry, 148 Ill. 372 (1893-94).

LICENSE REVOCATION FOR KEEPING SLOT MACHINE

(No. 8948—*B. H.—November 25, 1935—1½ pp.*)

The mere keeping of a slot machine is a violation of the law. Hence, the license of a cigarette dealer who kept such a machine was properly revoked.

Citation:

- Case: *Bobel v. People*, 173 Ill. 19 (1898).

**LICENSE REVOCATION FOR LAW VIOLATION—EFFECT OF
INJUNCTION ON ORDINANCE ENFORCEMENT**

(No. 7190—Mayor—O. F. W.—October 15, 1931—5½ pp.)

Where an injunction order restrains the police from "unlawful interference" or "interference with the lawful operations of complainant's business" or uses language of similar import, the police are not restrained from enforcing the various ordinances and laws while performing their official duties.

Where a licensed business is violating the law, the license of such business should be revoked upon notice and a hearing in conformity with the license ordinances before any actual interference by the police.

Citation:

Ordinance: Code '31, 36: 1901.

(2) *License Fees*

COLLECTION OF PEDDLER'S LICENSE FEES*

(No. 8712—M. H. F.—March 14, 1935—1 p.)

The responsibility for the enforcement of the peddler's license ordinance and the collection of the license fee lies with the Police Department and the License Bureau. The city probably does not have the authority to engage the services of an outside agency to supplement its efforts as there is no authority to pay a commission for such services.

**PAYMENT OF LICENSE FEES WHEN VALIDITY BEING
LITIGATED**

(No. 7025—City Collector—M. H. F.—July 23, 1931—1½ pp.)

Where the validity of a license fee is pending before the courts, the City Collector may accept any proffered license fees for the current year and give a receipt therefor if proof is shown that the full amount of unpaid back license fees for such person has been duly deposited in escrow.

*See also opinions, pp. 537-539, on peddlers' licenses.

AMOUNT OF LICENSE FEES—INCREASING FEES

(No. 7806—*Secretary, Commission on Revenue—M. H. F.—January 12, 1932—3½ pp.*)

The exercise of its police power by the city for the purpose of regulation is limited to such a charge for a license as bears some reasonable relation to the additional burdens imposed upon the city by the business or occupation licensed and the necessary expense involved in police supervision.

There is no reason for increasing the license fee of a person, who is licensed to conduct a retail business on his own property and who gives away with each sale articles of merchandise that are not nuisances.

There are serious doubts as to the power of the city to prohibit a filling station operator from distributing merchandise to increase his sales.

Citation:

Case: *Fligelman v. Chicago*, 348 Ill. 294 (1932).

REDUCTION OF LICENSE FEE—GASOLINE STATIONS*

(No. 8675—*M. H. F.—February 16, 1935—1 p.*)

The City Council is the only municipal authority empowered to reduce the amount of the gasoline filling station license fee.

Citation:

Ordinance: Gasoline Filling Station License ord., as amended Coun. J. (1932-33), p. 3429.

**REDUCTION OF MINIMUM FEE SET FOR LICENSE—
AMUSEMENT PLACES†**

(No. 8207—*L. H.—November 9, 1933—1½ pp.*)

No officer of the city has authority to accept less than the minimum license fee set by ordinance for public places of amusement, no matter what the size of the place may be.

Citations:

Ordinances: Code '31: 1908, 1911.

CASH PAYMENT FOR LICENSE FEES

(No. 8656—*M. H. F.—January 29, 1935—1 p.*)

City officials are not permitted to receive anything but cash as payment for license fees.

*See also opinions, pp. 524, 525, on gas station licenses.

†See also opinions, pp. 500-503, on amusement licenses.

RENEWAL OF LICENSE WITHOUT EXAMINATION—NON-PAYMENT OF BACK FEES—MASON CONTRACTOR*

(No. 8419—*Chairman, Board of Examiners of Mason Contractors—L. H.—June 5, 1934—3½ pp.*)

A person who desires to receive a renewal license for a mason contractor without subjecting himself to a new examination and the full initial license fee, in place of a lower renewal fee, must remain in the business continuously and pay each annual license fee in advance.

A person who remained in business for several years without taking out annual licenses is precluded from taking out a license for the current year unless he pays fees for the years which elapsed since he last took out a license, but this does not apply to those persons who were out of business for the interim.

Citations:

Ordinances: Code '31: 2915, 3816.

EFFECT OF BANKRUPTCY DISCHARGE ON DELINQUENT LICENSE FEES

(No. 7243—*City Collector—W. L. S.—November 2, 1931—3 pp.*)

A discharge in bankruptcy releases a filling station owner from liability for the delinquent license fees fixed by the city for the operation of a filling station.

The license fee fixed by the city for the operation of a filling station is a fee exacted in the exercise of regulatory police power.

Citations:

Statute: U.S.C.A., Title II, ch. 3.

Ordinances: Code '31: 3273-84.

Case: Fligelman v. Chicago, 348 Ill. 294 (1931).

Other reference: 1 Cooley, Taxation (4th ed.), sec. 27.

INTERPRETING LICENSE FEE ORDINANCE—HOCKEY AND FOOTBALL

(No. 7443—*City Comptroller—L. H.—February 8, 1932—2 pp.*)

The legislative interpretation of the Council of one of its ordinances should be followed in the matter of collecting fees for professional hockey and football matches.

Citation:

Ordinance: Code '31: 1897.

*See also Opinion No. 8163, p. 534.

RECOVERY OF LICENSE FEE PAID UNDER INVALID ORDINANCE

(No. 7498—*Chairman, Committee on Finance—R. N.—March 16, 1932—2½ pp.*)

A person who, in the absence of fraud or mistake and without compulsion, pays a license fee to the city cannot afterwards recover it, even though the ordinance under which it was required is found to be invalid.

Citations:

Ordinance: Code '31: 2913.

Cases: *Crerar Clinch Coal Co. v. Chicago*, 341 Ill. 471 (1931).
Yates v. Royal Insurance Co., 200 Ill. 202 (1902-03).

Opinions No. 8005 of April 8, 1933, and No. 8229 of December 1, 1933, both to the Chairman of the Committee on Finance are in accord with the above opinion.

RECOVERY OF FEE PAID UNDER DURESS

(No. 6815—*City Collector—M. H. F.—December 20, 1930—3 pp.*)

A license fee paid under an illegal ordinance and after protest may not be recovered, unless it was also paid because of duress.

Citations:

Cases: *Crerar Clinch Coal Co. v. Chicago*, 341 Ill. 471 (1930).
Arms v. Chicago, 251 Ill. App. 532 (1928-29).
Standard Oil Co. v. Bollinger, 337 Ill. 353 (1930).
Rhode v. Chicago, 254 Ill. App. 590 (1930).

RECOVERY OF LICENSE FEE PAID UNDER PROTEST

(No. 6976—*Chairman, Committee on Finance—M. H. F.—June 30, 1931—2½ pp.*)

A license fee paid voluntarily to the city cannot be recovered. Payment under protest is not sufficient for recovery as compulsion must also be present.

Citations:

Cases: *Crerar Clinch Coal Co. v. Chicago*, 331 Ill. 471 (1928).
Arms v. Chicago, 251 Ill. App. 532 (1928-29).
Rhode v. Chicago, 254 Ill. App. 590 (1929).
Standard Oil Co. v. Bollinger, 337 Ill. 353 (1930).
Yates v. Royal Insurance Co., 200 Ill. 202 (1902-03).

Opinion No. 8245 of December 15, 1933, to the County Clerk is in accord with the above opinion.

CITY COUNCIL'S POWER TO ORDER LICENSE FEE REFUND

(No. 8908—*Chairman, Committee on Finance—E. L. M.—November 1, 1935—3 pp.*)

The City Council may not order the refund of a license fee which was paid to the city voluntarily and without duress even though the city had no power to impose the fee.

Money voluntarily paid to the municipal corporation for licenses cannot be recovered even though the license is illegal, as the money has gone into the public funds.

Citations:

Cases: *Yates v. Royal Insurance Co.*, 200 Ill. 202 (1902-03).

People v. McBride, 234 Ill. 146 (1908).

Other reference: 4 Dillon, Mun. Corp. (5th ed.), 2831.

OPINION OF FOREGOING SYNOPSIS

We have your letter together with communication of the City Collector and petition for refund on food license expiring December 31, 1935. You request an opinion as to the rights of the city in the premises.

The records of the City Collector's office disclose that on April 3, 1935, there was issued a food dispenser license (service accommodations for twenty-four persons) covering the year ending December 31, 1935. The records also show that a fee of \$19.50 was collected for the license.

It does not appear from the records of the City Collector's office or from the original application for the license that the license fee was paid under protest or with any reservation whatever, nor do we find anything to indicate that the payment of said fee was not voluntarily made or that the applicant was ignorant of the facts and circumstances under which the payment was required.

The law is well settled that monies voluntarily paid to a municipal corporation for licenses cannot be recovered even though the city had no right to impose the tax.

"Sec. 1621 (944). Voluntary Payment: Mistake of Law.—Money voluntarily paid to a corporation under a claim of right, without fraud or imposition, for an illegal tax, license, or fine, cannot without statutory aid—there being no coercion, no ignorance or mistake of facts, but only ignorance or pure mistake of the law—be recovered back from the corporation, either at law or in equity, even though such tax, license fee, or fine could not have been legally demanded and enforced.—Dillon on Mun. Corp. (5th ed.), Vol. IV, p. 2831.

The rule above stated is supported by a long line of decisions, and there is no conflict of authority on the proposition, many of the cases holding that even where the money is paid under written protest it is a voluntary payment under the law.

In discussing the power of the City Council our Supreme Court has held that money paid to the proper municipal officers for a license is a condition precedent to the issuance of a license and that the money goes at once into the public fund and cannot be recovered from the municipality either at law or in equity even though such tax, license fee or fine could not have

been legally demanded or enforced.—*Yates v. Royal Insurance Company*, 200 Ill. 202; *The People v. McBride*, 234 Ill. 146:

"In *Elston v. City of Chicago*, *supra*, we said (p. 518): 'No case can be found, where money has been voluntarily paid with a full knowledge of the facts and circumstances under which it was demanded, which holds that it can be recovered back, upon the ground that the payment was made under a misapprehension of the legal rights and obligations of the party paying.'—*Yates v. Royal Insurance Company*, 200 Ill. 207.

It will thus be seen that in all instances where the license fee was paid voluntarily and without protest there is no basis in law whatever for a demand for the return of the fee. Furthermore, even where protest was made at the time of payment there can be no recovery unless the circumstances were of a character that there was duress; and such duress must have been real, not fancied.

We are of the opinion, therefore, that under the law the City Council is without power or authority to order a refund of the food dispenser license as petitioned.

* * * * *

REFUND BECAUSE OF DEATH OF LICENSEE

(No. 8879—*M. H. F.*—September 24, 1935—1½ pp.)

The City Code does not allow the refund of a license fee because of the death of the licensee.

Citation:

Ordinance: Code '31: 2913.

REFUND OF FEES COLLECTED SUBJECT TO ACTION BY CITY COUNCIL

(No. 6883—*Acting City Comptroller—L. H.*—May 1, 1931—4½ pp.)

A refund can be made by the Comptroller of fees collected under an ordinance where there is a doubt as to whether the money was lawfully collected and the money was taken subject to the disposition that the City Council would make of certain pending amendments to the ordinances, and the City Council passed such amendments and authorized a refund by ordinance.

Citation:

Ordinance: Code '22: 176, as amended Mar. 18, 1931.

REFUND OF FEE UNDER DOUBTFUL ORDINANCE—USED CAR DEALER*

(No. 8414—*Chairman, Committee on Finance—M. H. F.*—May 31, 1934—2½ pp.)

A claim for a refund of the city's second-hand store license fee should not be allowed even though the licensee was required to pay

*See also Opinion No. 8134, p. 449.

a state used-car license fee as the Supreme Court has not yet decided that the Illinois Motor Vehicle Anti-Theft law repealed the city's power to license second-hand stores and yards.

Citations:

Statute: SH '33, 121: 256.1-256.20.

Case: Rhode v. Chicago, 245 Ill. App. 590 (1927).

AMUSEMENT LICENSE FEE REFUND FOR CIVIC OPERA*

(No. 8152—*Chairman, Committee on Finance—E. L. M.—August 22, 1933—4½ pp.*)

The Chicago Civic Opera Company is not exempt from the requirements for a first class amusement license as it is not devoted exclusively to educational programs and conducted without gain or profit; hence the City Council cannot refund a fee paid for such license.

Money paid to the proper municipal officers for a license as a condition precedent to the issuance of a license goes at once into the public fund and cannot be recovered from the municipality either at law or in equity even though such tax, license fee or fine could not have been legally demanded or enforced.

Citations:

Cases: Chicago v. Klinkert, 94 Ill. App. 524 (1901).

Holder v. City of Galena, 199 Ill. App. 409 (1917).

Yates v. Royal Insurance Co., 200 Ill. 202 (1902-03).

Elston v. Chicago, 40 Ill. 518 (1863-66).

People v. McBride, 234 Ill. 146 (1908).

Other reference: Opinion No. 6808 (this volume, p. 501).

**REFUND AFTER REVOCATION OF BEVERAGE DEALER'S
LICENSE**

(No. 6443—*J. N. K.—June 3, 1929—2 pp.*)

The holder of a retail beverage dealer's license, class "A", which has been revoked is not entitled to a refund of the fee paid.

Citations:

Ordinance: Code '22: 2427.

Case: Illinois Glass Co. v. Chicago Telephone Co., 234 Ill. 535 (1908).

REFUND AFTER REVOCATION OF AUCTIONEER'S LICENSE

(No. 6940—*Chairman, Committee on Finance—M. H. F.—June 9, 1931—2 pp.*)

When an auctioneer's license has been revoked through no fault of his own, it is proper to refund that part of the license fee corresponding to the portion of the year during which he could not carry on his business.

*See also Opinion No. 6808, p. 501.

REFUND OF FEES PAID UNDER MISINTERPRETATION OF ORDINANCE

(No. 6849—City Comptroller—C. J. A.—March 20, 1931—7½ pp.)

Fees that are demanded by the city under a mistaken interpretation of an ordinance and which are paid to the city under protest and duress may be returned, but fees that are voluntarily paid under a mistaken interpretation of an ordinance cannot be recovered.

Basketball and hockey are not subject to the fees required by section 199 of the City Code of 1922.

Citations:

Ordinances: Code '22: 176, 177, 192, 199.

Coun. J. (1930-31), p. 4425.

Cases: Roth v. Chicago, 207 Ill. App. 117 (1918).

Chicago v. Klinkert, 94 Ill. App. 524 (1901).

Cook County v. Fairbank, 222 Ill. 578, 589 (1906).

REFUND OF FEES PAID UNDER MISTAKE OF FACT

(No. 6795—Chairman, Committee on Finance—M. H. F.—October 31, 1930—3½ pp.)

Where license fees were paid to the city under a mistake of fact by the city and a mistake of law by the licensee, the City Council has the legal right to refund the payments.

Citations:

Ordinance: Code '22: 374.

Cases: Yates v. Royal Insurance Co., 200 Ill. 202 (1902-03).

Arms v. Chicago, 251 Ill. App. 532 (1928-29).

Rhode v. Chicago, 254 Ill. App. 590 (1929).

REFUND OF LICENSE DEPOSIT

(No. 8390—W. V. D.—May 15, 1934—1½ pp.)

When an application for a license has not been approved after the applicant deposited the amount of the license fee with the City Collector and he can satisfactorily show that he did not engage in the business involved, he may apply for a refund.

Citation:

Ordinance: Code '31: 2900.

PERSON ENTITLED TO REFUND WHEN LICENSE NOT ISSUED

(No. 8045—City Comptroller—C. N.—May 5, 1935—2 pp.)

A refund for an unissued license should be made to the party who originally applied for the license, even though an interested judgment

creditor was one of the signers of the check covering the deposit for the license.

The city is not subject to process of garnishment, no matter what may be the character of its indebtedness.

Citations:

- Cases:** Merwin v. Chicago, 45 Ill. 36 (1867).
Chicago v. Hansley, 25 Ill. 596 (1860-61).

C. VEHICLE LICENSE

VEHICLE LICENSE REQUIREMENTS, PERSON HAVING CHICAGO ADDRESS AND OFFICE

(No. 8755—*M. H. F.*—April 27, 1935—2½ pp.)

A person who uses a Chicago office as his headquarters and who gives a Chicago address when registering his automobile with the Secretary of State, must pay the city vehicle license fee. However, a person residing in another city and paying a vehicle license fee to such city is not obliged to procure a Chicago vehicle license.

Citations:

- Statute:** SH '33, 95a: 27.
Ordinance: Code '31: 2063.
Case: Welsh v. Shumway, 232 Ill. 54 (1908).

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter which requests our opinion as to whether or not you are required to take out a City of Chicago vehicle license for your automobile.

You state that you have already taken out a State of Illinois license and given your address as Michigan avenue, Chicago. You also say that you report at this office, although you spend most of your time out of the city, traveling over the states of Michigan, Indiana and Ohio, and that while you have previously taken out a license in Ohio it would be more convenient for you to make your headquarters in Chicago.

The question for determination appears to be: Where is your residence or domicile? The courts have held that a man must have a residence or domicile somewhere, and can have but one domicile at a time. What is your intention is a controlling factor. (Welsh v. Shumway, 232 Ill. 54, 77.)

Inasmuch as you apparently have no residence other than Chicago and you must have a residence somewhere, and you have in registering your motor vehicle with the Secretary of State of Illinois stated under oath that your residence or address is Chicago, it would seem to us that Chicago is in fact your legal residence.

Section 2063 of the *Revised Chicago Code* of 1931 reads in part as follows:

"It shall be unlawful for any person, firm or corporation residing within the City of Chicago to use, or to cause or permit any of his or its

agents or employees to use, any motor vehicle upon the streets, avenues, or alleys of the city, unless such motor vehicle be licensed as hereinafter provided; * * * ."

You do not state that your residence is in or that your vehicle is licensed in or that you pay any vehicle tax in any city, village or town other than Chicago, so we assume that such is not the fact. If you were registered under the Illinois Motor Vehicle law and paid a vehicle tax to some other municipality you would not be required to pay the Chicago vehicle tax. (Par. 27, chap. 95a, Smith-Hurd Illinois Revised Statutes, 1933.)

Our opinion, therefore, is that you are subject to section 2063 of the Chicago Code and required to procure a City of Chicago vehicle license.

VEHICLE LICENSE REQUIREMENTS, NON-RESIDENTS OF CITY

(No. 7933—Commissioner of Police—A. F. G.—February 7, 1933—3 pp.)

Non-residents of the city need not comply with the municipal ordinance requiring motor vehicles to be licensed unless the ordinance specifically includes them.

Citation:

Ordinance: Code '31, 40: 2063, as amended, Coun. J. (1932-33), p. 3214.

CHANGE OF CONTENTS OF VEHICLE LICENSE STICKER

(No. 7168—Commissioner of Police—M. H. F.—October 5, 1931—1½ pp.)

The city may legally amend its motor vehicle license ordinance so as to require the city motor vehicle license sticker to contain on its face the name of the vehicle owner, his address and his telephone number.

VEHICLE LICENSE FEE FOR HALF YEAR—TRANSFERENCE OF VEHICLE LICENSE

(No. 8781—C. N.—May 28, 1935—1½ pp.)

A person who purchases an automobile before July 1st must pay the full year's city vehicle tax, but need pay only half of the tax if the automobile is bought after July first.

A person who purchases a used automobile from a private individual may have the city vehicle license transferred to him upon payment of one dollar.

Citations:

Ordinances: Code '31: 2066, 2068.

LICENSE FOR DELIVERY OF AUTOMOBILES TO DEALERS

(No. 6713—*Acting Commissioner of Police—M. H. F.—July 10, 1930—7 pp.*)

Residents of the city who deliver automobiles from manufacturers to dealers are exempt from the general license provisions of the State Motor Vehicle act but not from the city vehicle license ordinance and they must obtain a city license for every vehicle used on city streets.

Citations:

- Statutes: SH '29, 121: 17, 17a, 26.
Ordinances: Code '22: 4064, 4073.
Cases: Melton v. City of Paris, 333 Ill. 190 (1929).
Roe v. City of Jacksonville, 319 Ill. 215 (1926).

LICENSE OF AUTO BEING PHOTOGRAPHED

(No. 7593—*Prosecuting Attorney—C. J. A.—June 2, 1932—4 pp.*)

Driving a car onto the streets for the sole purpose of taking photographs of it is not "using" the car within the meaning of the city's vehicle license ordinance.

Citations:

- Ordinances: Code '31: 2063, 2073.
Case: Linton v. City of Columbus, 29 Ohio Cir. Ct. 390 (1907).
Other reference: Webster's International Dictionary, "use."

VEHICLE LICENSE REQUIREMENTS, TRUCKS IN INTERSTATE COMMERCE

(No. 6879—*Superintendent, License Bureau—C. J. A.—April 28, 1931—4½ pp.*)

Where a company is located in the city, has its garage here, and does not have its trucks licensed in any other state, it must obtain a city vehicle license for those of its trucks as operate in the city, even though they also operate in other states and are engaged in interstate commerce.

Citations:

- Statute: SH '29, 121: 227 (Motor Vehicle act, sec. 26).
Ordinances: Code '22: 4064, 4073.
Cases: Melton v. City of Paris, 333 Ill. 190 (1929).
Roe v. City of Jacksonville, 319 Ill. 215 (1926).
Hendrick v. Maryland, 235 U. S. 610 (1915).

VEHICLE LICENSE REQUIREMENTS, TRUCKS IN INTERSTATE COMMERCE

(No. 6975—*Acting Commissioner of Police—C. J. A.—June 29, 1931—6 pp.*)

That a company is engaged in interstate commerce is wholly immaterial so far as vehicle license fees are concerned as a vehicle license fee is not an occupation tax but a police and traffic regulation imposed on all motor vehicles indiscriminately regardless of the class of business they are engaged in.

A corporation which is incorporated under the laws of Illinois and has its home office in Chicago must obtain a state and city vehicle license for its trucks operating on the streets of the city, even though the trucks load outside of the state and engage in interstate commerce.

Citations:

Statute: Motor Vehicle act, sec. 20.

Cases: Fairbanks Steamshovel Co. v. Wills, 240 U. S. 642 (1915).

Hendrick v. Maryland, 235 U. S. 610 (1915).

Kane v. New Jersey, 242 U. S. 160 (1916).

Hess v. Pawloski, 274 U. S. 352 (1927).

Sprout v. City of South Bend, 277 U. S. 163 (1928).

Interstate Busses Co. v. Blodgett, 276 U. S. 245 (1927).

Other reference: 14 CJ 339.

STATE AND CITY VEHICLE LICENSES, USE OF STREETS BY RESIDENTS

(No. 8312—*Superintendent, Bureau of License Enforcement—M. H. F.—February 21, 1934—7½ pp.*)

One who resides in Chicago and who owns a motor vehicle that is used for hire in the city must purchase a city vehicle license for it, even though he has registered and procured a license for the vehicle in another state.

A state license must be displayed upon every motor truck, motor driven commercial vehicle or motor vehicle used for public hire that is found operating upon streets, avenues or alleys of Chicago, regardless of whether the truck owner is a resident of Illinois or not.

Citations:

Statutes: SH '33, 121: 221, 227.

Ordinance: Code '31: 2063, as amended May 31, 1933.

Cases: City of Flora v. Borders, 342 Ill. 208 (1931).

City of Benton v. Whaley, 230 Ill. App. 309 (1923).

Heartt v. Village of Downers Grove, 278 Ill. 92 (1917).

City of Lincoln v. Dehner, 268 Ill. 175 (1915).

Robbins v. City of Herrin, 293 Ill. 133 (1920).

Other references: Opinion No. 7665 (this volume, p. 473).

Opinion No. 7028 (this volume, p. 476).

*See also Opinion No. 7742, p. 476, on licensing by the city of vehicles used in interstate commerce.

GRACE PERIOD FOR STATE AND CITY VEHICLE LICENSES

(No. 6639—Commissioner of Police—M. H. F.—April 11, 1930—4 pp.)

The Illinois Motor Vehicle act provides that persons applying for a state license within twenty-four hours after taking possession of a motor vehicle shall have ten days to operate that motor vehicle without displaying license plates. This, however, does not confer any privilege upon persons residing within the city to use a motor vehicle without being licensed under the city's wheel tax ordinance, even for the ten day period.

Citations:

Ordinance: Code '22: 4064, as amended.
Statute: Motor Vehicle act, sec. 17.

POWER TO LICENSE MOTOR VEHICLES OF NON-RESIDENTS

(No. 7665—M. H. F.—July 26, 1932—6½ pp.)

The city may pass an ordinance to require the licensing of commercial motor vehicles and motor vehicles used for public hire on Chicago streets, where such vehicles are owned by any person, firm or corporation not residing in Chicago.

Citations:

Statutes: SH '31, 24: 65.95.
Motor Vehicle act, secs. 8-10, 14, 17, 20, 26-27.
Ordinance: Code '31: 2070.
Cases: Ferguson Coal Co. v. Thompson, 343 Ill. 20 (1931).
Melton v. City of Paris, 333 Ill. 190 (1929).
Chicago v. Foley, 335 Ill. 584 (1929).
Hendrick v. Maryland, 235 U. S. 610 (1914).
City of Flora v. Borders, 342 Ill. 208 (1931).
Sprout v. City of South Bend, 277 U. S. 163 (1927).
Other reference: Opinion No. 7029 (this volume, p. 476).

OPINION OF FOREGOING SYNOPSIS

The draft form of the proposed ordinance providing for the licensing of trucks not having Illinois state licenses is returned herewith.

We have examined the ordinance and reached the conclusion that it would be within the power of the City Council to enact it. In form it is an amendment to section 2063 of the Revised Chicago Code of 1931 and adds to that section a provision making it "unlawful for any person, firm or corporation not residing within the City of Chicago to use or cause or permit any of his or its agents or employees to use any motor truck, motor driven commercial vehicle or motor vehicle which is used for public hire, upon the streets, avenues or alleys of the city, unless such motor truck, motor driven commercial vehicle or motor vehicle which is used for public hire be licensed" under the ordinance, "unless such owner shall have obtained a certificate from the Secretary of the State of Illinois and paid the registra-

tion fee as provided for such motor truck, motor driven commercial vehicle or motor vehicle which is used for public hire, as by law provided."

By section 96, article V, chapter 34 (Cities and Villages act) Smith-Hurd Ill. Rev. Stat., 1931, cities in Illinois are given express authority "to direct, license and control all wagons and other vehicles conveying loads within the city, or any particular class of such wagons, and other vehicles, * * * the license fee when collected to be kept as a separate fund and used only for paying the cost and expenses of street and alley improvement or repair."

The wheel tax license ordinance of the City of Chicago, which it is proposed to amend, already meets the requirement of the statute as to the application of the revenue by providing in section 2070 as follows:

"2070. Application of revenues: All revenues derived from such license and transfer fees shall be kept as a separate fund and used for paying the cost of street and alley improvement and repair. Such revenue shall be used in the manner provided for in the annual appropriation bill or in such other manner as the City Council may by ordinance direct."

The Supreme Court of Illinois has held that the legislature may give the city jurisdiction over public streets (Ferguson Coal Company v. Thompson, 343 Ill. 20); that a municipality may pass an ordinance imposing licenses on vehicles using its streets (Melton v. City of Paris, 333 Ill. 190; Elie v. Adams Express Co., 300 Ill. 340; Roe v. City of Jacksonville, 319 Ill. 215); and that the power of the city to regulate the use of the streets was not conferred upon it by the Motor Vehicle act but had existed long prior thereto by virtue of the above mentioned section 96 of the Cities and Villages act (City of Chicago v. Foley, 335 Ill. 584).

Conceding for the purpose of this opinion that cities may not by ordinance adopt regulations applicable to motor vehicles that contravene the statutes of the state, our examination of the Illinois Motor Vehicle act fails to disclose any provision which in our opinion would cause the proposed ordinance to be repugnant to the paramount law. In fact, it is expressly provided in section 26 of the Motor Vehicle act—the section which exempts motor vehicle owners who are registered with the Secretary of State from being required by any city other than the municipal corporation within Illinois other than that within which said owner resides to pay any tax or license fee for the use of such motor vehicle—"that nothing in this act contained shall be construed as affecting the power of municipal corporations to make and enforce ordinances, rules and regulations affecting motor trucks and motor driven commercial vehicles used within their limits for public hire, or from making and enforcing reasonable traffic and other regulations except as to rates of speed not inconsistent with the provisions hereof."

The power to regulate the use of highways extends to their use by non-residents as well as residents. (Hendrick v. Maryland, 235 U. S. 610, 622; Hess v. Pawloski, 274 U. S. 352; Kane v. New Jersey, 242 U. S. 160, 167.) The decision of the Supreme Court of Illinois in *City of Flora v. Borders*, 342 Ill. 208, is not at variance with the principle announced by the Supreme Court of the United States in the cases cited above, as the *City of Flora* case merely holds that under section 26 of the Illinois Motor Vehicle act one who lives and has his place of business outside the limits of a city cannot be compelled by the city to pay a vehicle license fee for the use of his truck upon the streets of the city *where the truck was duly licensed under the state law*. The ordinance under consideration does not, by its terms, require motor vehicle operators who are non-residents of Chicago and who are licensed under the Illinois state law to procure the city license.

It could not be successfully urged that the proposed ordinance was violative of the commerce clause of the United States Constitution, or that the

license fee constituted a burden on interstate commerce, for the law is now well settled that the mere fact that a person may be engaged in interstate commerce does not exempt him from paying license fees for his motor vehicles in the states over whose streets and highways he operates such vehicles. (Hendrick v. Maryland, 235 U. S. 610, 622; Morris v. Duby, 274 U. S. 135; Clark v. Poor, 274 U. S. 554; Sprout v. City of South Bend, 277 U. S. 163.) * * *

So, unless the Illinois Motor Vehicle act exempts motor trucks and motor driven commercial vehicles from other cities from the necessity of procuring municipal licenses, the City of Chicago has, in our opinion, the power to pass and enforce the ordinance under review. As above stated, we find no such exemption provision in that act. The act contains no specific or general exemption of foreign owned motor vehicles.

* * * * *

VEHICLE LICENSE REQUIREMENTS, NON-RESIDENT FOREIGN CORPORATIONS

(No. 6909—Acting Commissioner of Police—W. W.—May 22, 1931—
2½ pp.)

An Indiana corporation which operates motor vehicles in Chicago is not a resident of Chicago, and need not pay the city's wheel tax license fee.

Citations:

Statutes: Cah. '29, 95a: 20, 26.
Ordinance: Code '22: 4064.

VEHICLE LICENSE REQUIREMENTS, NON-RESIDENT DOMESTIC CORPORATIONS

(No. 6989—Acting Commissioner of Police—C. J. A.—July 6, 1931—
4½ pp.)

Illinois corporations which have paid an Illinois vehicle license fee and whose articles of incorporation designate their principal place of business as outside of Chicago, are not subject to any vehicle taxes or licenses imposed by the city.

Citations:

Statutes: SH '29, III: 227.
Id., 32: 4, 59.
General Incorporation act, secs. 4, 27, 59.
Cases: City of Benton v. Whaley, 230 Ill. App. 309 (1923).
Heartt v. Village of Downers Grove, 278 Ill. 92 (1917).
City of Lincoln v. Dehner, 268 Ill. 175 (1915).
Robbins v. City of Herrin, 293 Ill. 133 (1920).
Fairbanks Shovel Co. v. Wills, 240 U. S. 642 (1916).
Other reference: 14 CJ 338.

VEHICLE LICENSE REQUIREMENTS, USE OF STREETS BY TRUCKS OF NON-RESIDENTS

(No. 7029—*Secretary, Commission on Revenue*—C. J. A.—July 27, 1931—8 pp.)

Motor trucks, though operating on the city streets as a terminus for a long distance haul or otherwise, which are owned by non-residents of the City of Chicago, are not subject to any existing city vehicle license fee, but the City Council has the legal power to subject them to such license and license fees, even when they are owned by non-residents of this state.

A license ordinance which was applicable to non-residents of the state as well as to residents of the city but not to residents of other parts of this state would not be unlawfully discriminatory.

Citations:

Statutes: Motor Vehicle act, secs. 14, 20, 26.

Ordinance: Code '31: 2063.

Cases: Clark v. Poor, 274 U. S. 554 (1927).

Hendrick v. Maryland, 235 U. S. 610 (1915).

Kane v. New Jersey, 242 U. S. 160 (1916).

Hess v. Pawloski, 274 U. S. 352 (1927).

Morris v. Duby, 274 U. S. 135 (1927).

Interstate Busses Co. v. Blodgett, 276 U. S. 245 (1928).

Elie v. Adams Express Co., 300 Ill. 340 (1922).

Melton v. City of Paris, 333 Ill. 190 (1929).

VEHICLE LICENSE REQUIREMENTS, NON-RESIDENT CHICAGO SCHOOL TEACHERS

(No. 7159—*Superintendent, Department of License*—C. J. A.—September 29, 1931—1½ pp.)

School teachers who are in the employ of the Board of Education and who reside outside of the City of Chicago are not required to procure city vehicle licenses for the automobiles operated by them from their homes outside of the city to the schools where they are employed.

Citations:

Statutes: SH '29, 121: 227.

VEHICLE LICENSE REQUIREMENTS, VEHICLES OF NON-RESIDENTS

(No. 7742—*Commissioner of Police*—C. J. A.—September 8, 1932—9½ pp.)

Persons engaged in the business of passenger bus transportation between Chicago and foreign states, unless they reside in Chicago, do not have to procure Chicago vehicle licenses or pay license fees un-

der the existing ordinance, but this ordinance could be amended so as to require such automobile owners residing outside the city but operating in the city, to obtain licenses and pay license fees to the city.

A foreign corporation having a place of business in the State of Illinois must obtain a state motor vehicle license for automobiles operated in connection with that place of business.

A license fee on automobiles engaged in interstate commerce is valid so long as such fee does not constitute a tax on the business itself, but is a reasonable and uniform license fee imposed on all motor vehicles alike and where such license fees are used, wholly or in part, to defray the expenses of construction and upkeep of state highways.

Citations:

Statutes: SH '31, 121: 208, 209, 221 (Motor Vehicle act, secs. 8-10, 14, 17, 20, 26, 27).

Ordinance: Code '31: 2063.

Cases: Clark v. Poor, 274 U. S. 554 (1929).

Hendrick v. Maryland, 235 U. S. 610, 622 (1914).

Kane v. New Jersey, 242 U. S. 160, 167 (1916).

Elie v. Adams Express Co. 300 Ill. 340 (1922).

Melton v. City of Paris, 333 Ill. 190 (1929).

VEHICLE LICENSE AND REGISTRATION, FOREIGN BUSES OPERATING IN CITY

(No. 8037—*M. H. F.*—April 28, 1933—1½ pp.)

Motor buses which are brought from outside of Illinois to Chicago for the period of the Century of Progress Exposition and are used to carry passengers for hire within Chicago, are subject to the state and city vehicle registration and license laws and ordinances.

If a bus operator who has brought passengers to Chicago and expects to return them after their sojourn here should carry those passengers to and from their sleeping quarters and the Fair grounds, and take them on sightseeing tours around the city, he would be subject to the state and city registration and license laws and ordinances.

VEHICLE LICENSE REQUIREMENTS, EXTENT OF COMITY PRIVILEGES

(No. 7985—*M. H. F.*—March 29, 1933—2½ pp.)

Non-resident owners of motor vehicles and non-resident chauffeurs are accorded reciprocal privileges to those enjoyed by Illinois citizens in other states, foreign countries, provinces, territories or federal districts.

Foreign corporations maintaining places of business in Illinois and

making use of motor vehicles in connection with them are not entitled to non-resident privileges but must comply with the state vehicle laws.

Automobiles brought to Chicago by non-residents for the period of the Century of Progress Exposition and operated as commercial vehicles for hire within the city are subject to both the state and city license fee.

POLICE ENFORCEMENT OF LICENSE REQUIREMENTS

(No. 6495—*Commissioner of Police—M. H. F.—August 17, 1929—7½ pp.*)

It is the duty of the Department of Police to stop all motor vehicles which do not display state license plates or transit permits, and if such persons do not furnish satisfactory evidence of their right to operate their vehicles for a period of ten days after taking possession, a privilege granted by statute after the fulfillment of certain conditions, arrests should be made, or arrest slips should be given and prosecutions begun.

The operators of cars carrying foreign license plates are allowed a period of six months as a non-resident privilege, and are subject to prosecution for the violation of the privilege.

The residents of the city are required to pay a city motor vehicle license tax, and the failure to do so subjects the offender to a quasi-criminal prosecution in the name of the city.

Citation:

Statute: Cah. '29 ch. 25a.

FREE VEHICLE LICENSE STICKERS TO OFFICIALS OF OTHER GOVERNMENTS*

(No. 7184—*City Clerk—M. H. F.—October 10, 1931—2 pp.*)

Unless the City Clerk is expressly empowered by ordinance, he may not issue city vehicle license sticker emblems gratuitously to federal, state or county officials or agencies.

Opinion No. 6619 of March 12, 1930, to the United States Collector of Customs is in accord with the above opinion.

*See opinions, p. 19, on vehicle licenses for state owned automobiles; also Opinion No. 7057, p. 130, on free issuance of license stickers.

EXEMPTIONS FROM VEHICLE LICENSE—CONSULS AND COAST GUARD OFFICIALS

*(No. 8653—Division Engineer, United States Coast Guard—M. H. F.—
January 28, 1935—2 pp.)*

The only exemption granted by the city vehicle license ordinance is that afforded to resident consular representatives of foreign governments who are nationals of foreign countries. The City Council can, if it sees fit, exempt resident officials of the United States coast guard from the vehicle license requirements, but neither the Mayor nor the law department have any power to do so.

Citation:

Ordinance: Code '31: 2073.

LICENSE EXEMPTIONS TO AUTOMOBILES OF THE FEDERAL GOVERNMENT*

*(No. 7412—Keeper in Charge, United States Lighthouse—M. H. F.—
January 12, 1932—1½ pp.)*

Automobiles which are the property of the federal government and which are used by federal employees for governmental purposes, are not subject to the city's Vehicle License ordinance.

LICENSE EXEMPTIONS TO PRIVATE VEHICLES OF FEDERAL OFFICIALS

(No. 7567—City Council—M. H. F.—May 4, 1932—3 pp.)

Vehicles privately owned by members of the regular army, the United States navy, or by other federal officials, who are stationed for duty on federal reservations beyond the jurisdiction of the city are exempt from the licensing provisions of the city's wheel tax ordinance. Privately-owned vehicles of federal officials who reside within the city are not exempt from the licensing provisions of the city's wheel tax ordinance.

Vehicles which are property of the United States and are operated on the streets of the city are beyond the provisions of the city's wheel tax ordinance.

Citations:

Ordinance: Code '31: 2073.

Case: Johnson v. Maryland, 254 U. S. 51 (1920).

Other reference: Op. Corp. Counsel (1920-23), p. 493.

*See also opinions, pp. 7, 8, on vehicle licenses for automobiles owned by the federal government.

LICENSE EXEMPTIONS FOR COAST GUARD MEMBERS

(No. 7566—Mayor—M. H. F.—May 4, 1932—3 pp.)

Automobiles which are privately owned and operated upon the streets of Chicago by members of the United States coast guard who are residents of the city are not exempt from the city vehicle tax.

The City Council should pass an ordinance if it desires to enlarge the exemption now accorded to members of the regular army so that it will include members of the United States coast guard, who do, in fact, reside within the city and who operate their privately owned vehicles upon its streets.

Citations:

Ordinances: Code '31: 2063, 2073.

Case: Johnson v. Maryland, 254 U. S. 51 (1920).

Other reference: Op. Corp. Counsel, 1920-23, p. 493.

LICENSE EXEMPTIONS FOR TEACHERS AND CITY EMPLOYEES

(No. 7976—Mayor—L. H.—March 24, 1933—1½ pp.)

An ordinance would be necessary to exempt school teachers and city employees from the payment of their vehicle tax in cash, allowing them to assign to the city or the Board of Education a part of their salaries to pay their license fees.

The court would probably hold valid an ordinance which places the school teachers and city employees in a class by themselves, since the city and the school board are unable to pay salaries promptly, thus making the classification a reasonable one.

MOTOR COACH LICENSE REQUIREMENTS

(No. 8893—Commissioner, Public Vehicle License Commission—J.F.G.—October 11, 1935—4 pp.)

A city motor coach license is required only for a bus which for a charge indiscriminately accepts and discharges such persons as may offer themselves for transportation.

A bus operated by a company which has a certificate of public necessity and convenience, but which is leased for use as a sightseeing bus, must have a city motor coach license.

Buses under contract for the transportation of school children and chartered buses do not need a city motor coach license.

Citations:

Ordinances: Code '31: 2077-78.

LICENSING OF PUBLIC PASSENGER VEHICLES WITH AND WITHOUT TAXIMETERS*

(No. 7973—Chairman, Committee on Local Transportation—B. J. K.—March 21, 1933—2½ pp.)

Section 2077 of the City Code, which provides that no public vehicle shall operate for hire on city streets without first obtaining a license, applies to all public vehicles to which a taximeter is attached.

Section 2089 of the City Code does not apply to public vehicles to which a taximeter is attached, but deals with public passenger vehicles to which no taximeter is attached, such as funeral cars and cars rented by the hour or day from a garage.

Citations:

Ordinances: Code 31: 2077, 2089, 2118-20.

POWERS AND DUTIES OF PUBLIC VEHICLE LICENSE COMMISSION—REGULATION OF TAXICABS

(No. 7601—Commissioner of Police—C. J. A.—June 10, 1932—6 pp.)

The Public Vehicle License Commission has power to suspend or recommend to the Mayor the revocation of a public vehicle license or the driver's license where there has been a violation of the statutes or ordinances concerning public vehicles.

The ordinance concerning the cruising of taxicabs appears broad enough to prohibit the cruising in front of motor coaches and the picking up by solicitation of persons waiting for motor coaches.

The operator of a public vehicle may not charge any different rates of fare than those posted in his cab and shown by his taximeter.

Where a taxi operator has actually been convicted by a court for the violation of a statute or ordinance concerning public vehicles, the Public Vehicle License Commission should assume that conviction was legally justified and act accordingly.

Citations:

Ordinances: Code '31: 2080-81, 2088, 2090, 2094-96, 2098, 2103, 2118.

PUBLIC PASSENGER VEHICLE LICENSE—TRANSPORTATION OF PASSENGERS BETWEEN AIRPORT AND LOOP

(No. 8732—Deputy Commissioner, Public Vehicle Commission—O. F. W.—March 27, 1935—2 pp.)

Automobiles hired at a flat rate and which do not accept passengers indiscriminately but only transport customers of an airplane

*See also opinions, p. 444, on taxicab regulation.

company between the airport and the loop do not come within the provisions of the public passenger vehicle ordinance.

Citation:

Ordinance: Code '31: 2078, as amended June 13, 1934.

PUBLIC PASSENGER VEHICLE LICENSE, FUNERAL AND LIVERY CARS

(No. 8571—*Public Vehicle License Commissioner—M. H. F.—November 23, 1934—4 pp.*)

If motor vehicles denominated "livery and funeral cars" are in fact operated upon the streets of the city for the carriage of passengers for hire and if they indiscriminately accept and discharge all such persons as may offer themselves for transportation, they must obtain a public passenger vehicle license from the city.

If funeral cars are kept by morticians to carry only passengers at funerals, the provision of the Motor Vehicle act which requires the filing of a bond with the Secretary of State indemnifying passengers against injury, would not apply to these cars.

Citations:

Statute: Motor Vehicle act, sec. 42-A.

Ordinance: Code '31: 2077, 2078 as amended June 13, 1934.

Other references: Opinion No. 8203 (this volume, p. 628).

Op. Ill. Atty. Gen. July 22, 1933, File No. 405.

D. LIQUOR LICENSE*

(1) General Scope and Limitations†

CITY'S POWER OVER LIQUOR LICENSES—DRY PRECINCTS

(No. 8651—*M. H. F.—January 26, 1935—3 pp.*)

The state liquor control law covers the entire field of manufacturing, distributing and selling alcoholic liquor and the City of Chicago has enacted license ordinances under the limited powers delegated to it by this law.

The city has power to fix the number of retail liquor licenses which shall be issued within its jurisdiction.

The power to vote "dry" any precinct in any district of the city and to prohibit the retailing of alcoholic liquor therein, is lodged in a majority of the legal voters thereof.

Citation:

Statute: Ill. Laws (Sp. Sess., 1933-34), p. 82.

*See also pp. 396-401 on liquor regulation.

†See also Opinion No. 8868, p. 686, on the question of a liquor license for a boat moored in Lake Michigan.

OPINION OF FOREGOING SYNOPSIS

* * * The state liquor control law covers the entire field of manufacturing, distributing and selling alcoholic liquor and prescribes the manner in which persons and establishments may be licensed to dispense the same. Municipalities are delegated only limited powers with respect thereto, and may not enact any ordinance inconsistent with the state law. In harmony with the state law the City Council has passed and there is now in force a retail liquor dealers license ordinance which does little more than provide the manner of applying for and issuing licenses; fix the license period and the amount of the license fee; and prescribe prohibited hours of sale. Otherwise, all regulatory provisions affecting the sale of alcoholic liquor are contained in the state act.

While the city doubtless has power to fix the number of retail licenses which shall be issued within its jurisdiction, so far the City Council has not exercised this authority. Even were the City Council to prescribe a maximum number of licenses it is problematical whether such legislation would result in controlling the allocation of retail establishments. * * * Nevertheless, we would say that we believe taverns can and should be forced to obey the statutory and municipal laws enacted for their regulation.

It is suggested that action should be taken so the citizens of the district can vote by precincts as to whether they want taverns in their respective precincts. Such right of action is specifically given by the state law. Article IX of the State Liquor Control law provides that when any legal voters of a precinct or group of precincts of a city desire to pass upon the question of whether the sale at retail of alcoholic liquor shall be prohibited in such precinct or group of precincts, they may file in the office of the City Clerk a petition containing the signature of not less than twenty-five per cent of the voters of such precinct or group of precincts. Upon the filing of such petition in the form prescribed it is made mandatory upon the election authorities to submit the proposition to the voters at the next ensuing election at which such proposition may be voted upon. If a majority of the legal voters voting upon such proposition shall vote "yes" the article provides the sale at retail of alcoholic liquor shall be prohibited in such precinct or group of precincts. It is further provided that all places where alcoholic liquor is sold in violation of any provision of the article shall be taken and held and are declared to be common nuisances and may be abated as such. It will therefore be seen that power to vote "dry" any precinct and to prohibit the retailing of alcoholic liquor therein is lodged in a majority of the legal voters thereof. * * *

FEES AND APPLICATIONS FOR LIQUOR LICENSES IN DRY PRECINCTS

(No. 8639—City Collector—M. H. F.—January 23, 1935—1 p.)

The City Collector should not accept applications for retail liquor dealer's licenses or the tendered license fees from any person seeking to conduct a retail liquor business within the precincts which have been voted "dry."

LICENSE REFUNDS FOR PREMISES IN DRY PRECINCTS

(No. 8450—*City Collector—M. H. F.—June 28, 1934—3 pp.*)

Under provisions of the Illinois Liquor Control act, the City Collector must refund to liquor licensees located in precincts which have voted "dry" that portion of their license fee which represents the unexpired period of time from thirty days after the vote was taken to the end of the license period.

Similarly, the provision for refunds to liquor licensees located in precincts which have voted "dry" applies to dealers to whom a license has not been issued but who have been operating under a receipt from the collector for the deposit of money representing the license fee.

The statutory provisions compelling a refund of license fees for the unexpired portion of the year after a precinct has voted "dry" supersedes an ordinance provision prohibiting refunds of license fees.

Citations:

Statute: Ill. Laws (Sp. Sess., 1933-34), pp. 64, 89 (Liquor Control act, secs. 1, 16).

Ordinance: Code '31: 2900.

LICENSE REFUNDS FOR PREMISES IN DRY PRECINCTS

(No. 8770—*Chairman, Committee on Finance—M. H. F.—May 16, 1935—4½ pp.*)

Holders of liquor licenses, or holders of receipts evidencing the deposit of liquor license fees whose establishments are located within precincts which have voted "dry" have a right to a refund of that part of the license fee representing the time from thirty days after the vote to the end of the current license period, provided that the persons do not voluntarily discontinue business, or have their licenses revoked before the date the vote becomes effective.

Citations:

Ordinance: Code '31: 59.

Coun. J. (1933-34), p. 1542 (Retail Liquor Licensing ord.).

TRANSFER OF LIQUOR LICENSE

(No. 8342—*City Collector—M. H. F.—March 26, 1934—2½ pp.*)

The transfer or alienation of a city retailer's alcoholic liquor license, being in contravention of the state law, is invalid.

Citations:

Statute: Illinois Liquor Control act, art. VI, sec. 1.

Ordinance: Code '31: 2934.

LICENSE WHEN ANOTHER TAVERN NEARBY—LEASE AND OWNERSHIP REQUIREMENTS

(No. 8655—*Deputy Liquor Control Commission—M. H. F.—January 29, 1935—2 pp.*)

The Mayor is not authorized to refuse a liquor license to an applicant solely because there is another licensed liquor dealer already located in the same building or on premises situated nearby.

A liquor license applicant must either own the premises for which a license is sought or he must have a lease thereon that covers the period for which the license is sought.

Citation:

Statute: Ill. Laws (Sp. sess., 1933-34), p. 68 (Liquor Control act, art. VI, sec. 2 [13]).

LICENSE FOR PREMISES NEAR CHURCH OR TUBERCULOSIS SANITARIUM—CANCELLATION OF ERRONEOUSLY ISSUED LICENSE

(No. 8877—*Deputy Liquor Control Commissioner—M. H. F.—September 23, 1935—4 pp.*)

No license may be issued for the sale at retail of alcoholic liquor in any place within one hundred feet of the property line of a store used as a place of organized religious worship or of the boundary line of the Municipal Tuberculosis Sanitarium, unless the place of sale is located within a hotel regularly offering restaurant service, a regularly organized club, a restaurant, a food shop, or any other place where the sale of alcoholic liquor is not the principal business.

If a retail liquor dealer's license has been inadvertently issued for the sale of alcoholic liquor in a prohibited place, the license should be terminated in some other manner than formal revocation, so as to save the licensee from the consequences of revocation under the liquor control law.

Citations:

Statute: Ill. Laws (Sp. sess., 1933-34), p. 71 (Liquor Control act, art. VI, sec. 8).

Ordinance: Code '31: 2293.

LIQUOR LICENSE FOR PREMISES NEAR CHURCH, SCHOOL OR HOSPITAL

(No. 8952—*City Collector—M. H. F.—December 3, 1935—3½ pp.*)

A retailer's liquor license may be issued to an eligible applicant if the building-line of the proposed liquor premises is located more than

one hundred feet, measured in a straight line, from the nearest part of church-owned premises actually used for church purposes. Church-owned vacant land not actually used for church purposes is not entitled to the protection of the Liquor Control act.

Measurements to schools, hospitals, or homes mentioned in the Liquor Control act should be made to the nearest lot line rather than the school, hospital, or home buildings in those cases where contiguous yards or grounds may be fairly considered to be devoted to school, hospital, or home purposes.

Citation:

Statute: SH '35, 43: 127.

LIQUOR LICENSE FOR PREMISES NEAR UNDERTAKING PARLORS

(No. 8350—Commissioner of Police—M. H. F.—March 31, 1934—3½ pp.)

The restriction prohibiting the location of a retail liquor establishment within a hundred feet of an undertaking establishment or mortuary does not apply to any such establishment which was lawfully in operation prior to February 1, 1934 and which remained continually in lawful operation subsequent to that date, but any new applicant for a license desiring to take over this kind of establishment would come within the above prohibition.

Citations:

Statutes: Liquor Control act, art. VI, sec. 8, art. LXXI, sec. 1.

LICENSE FOR PREMISES WITHIN MUNICIPAL AIRPORT

(No. 8845—Comptroller—M. H. F.—August 12, 1935—2½ pp.)

A retail liquor dealer's license should not be issued to anyone to sell alcoholic liquor on premises within the boundaries of the Municipal Airport, and if such a license has been issued, it should be revoked.

No alcoholic liquor license of any kind should be issued to a person who does not own the premises, or does not have a lease for the full period for which the license is to be issued. A lease that may be terminated by giving thirty days' notice does not seem to be such a lease.

Citations:

Statutes: Ill. Laws (Sp. sess. 1933-34), pp. 68, 71 (Liquor Control act, art. VI, sec. 2, par. 13; sec. 11).

Other reference: Opinion No. 8843 (this volume, p. 487).

Municipal Airport: The denial of a city retail alcoholic liquor license for premises located in the administration building of the Chicago Municipal Airport was upheld by the Superior Court of Cook County. The prohibition of the sale of alcoholic liquors in any city building was held to apply to buildings owned by the city regardless of whether it was used for a strictly governmental or corporate purpose.—*Standard Concessions, Inc. v. Chicago* (August 29, 1934, Superior Court of Cook County, No. 36-S-4686).

LICENSE FOR CITY-OWNED PREMISES

(No. 8843—Comptroller—M. H. F.—August 10, 1935—4 pp.)

A building and land owned by the city but rented to a tenant on a long term lease, the tenant having exclusive control and the building and land in no way being devoted to municipal purposes is not subject to the prohibition of the sale of alcoholic liquors in buildings belonging to or controlled by the city. The phrase "belonging to" in the State Liquor Control act does not mean "owned by."

The sale and delivery of alcoholic liquor is prohibited at Navy Pier and the Administration Building of the Municipal Airport, as they belong to, and are controlled by the city.

To protect the city from claims for damages due to intoxication, no city-owned building should be leased for use as a liquor establishment, and no retail liquor dealers' license should be granted for premises situated on city-owned land or building without a surety bond.

Citation:

Statute: Ill. Laws (Sp. sess., 1933-34), pp. 71, 72 (Liquor Control act, art. VI, secs. 11, 14).

LICENSE FOR CONCESSION IN CITY-OWNED PARK

(No. 8848—Comptroller—M. H. F.—August 14, 1935—1½ pp.)

As Rainbow Park belongs to, and is under the control of the city, a retail liquor dealer's license should not be issued to a concessionaire located within the park.

A retail liquor dealer's license should not be issued to anyone not having a lease for the full period for which license is to be issued.

LICENSE FOR SEPARATE LOCATIONS IN ONE HOTEL

(No. 8446—Superintendent, Bureau of License—M. H. F.—June 27, 1934—2½ pp.)

A liquor license must be obtained for each place where liquor is sold at retail even if several such places are in one hotel.

Citation:

Ordinance: Coun. J. (1933-34), p. 1542 (Retail Liquor Dealers Licensing ord., sec. 3143-K).

SEPARATE LICENSE FOR EACH LIQUOR DISPENSARY— LIQUOR SALE IN BASEMENT

(No. 8633—M. H. F.—January 18, 1935—2 pp.)

A separate license is required for each location, place or premise where alcoholic liquor is dispensed, regardless of whether this location, place or premise is under the same roof or at one street address.

Alcoholic liquor cannot be sold in a basement that has not a clear view into its interior from the street, unless it be a restaurant, hotel or club.

Citations:

Statute: Ill. Laws (Sp. sess., 1933-34), p. 74.

Ordinance: Coun. J. (1933-34), p. 1542 (Retail liquor dealer's ord., sec. 3143-K).

LICENSE FOR RESTAURANT WITHOUT CLEAR VIEW FROM STREET

(No. 8616—City Collector—M. H. F.—January 8, 1935—4 pp.)

A restaurant to which there is not a clear view from the street due to its being located on the second floor must obtain a city food dispenser's license in order to qualify itself for a city retail liquor license.

Citation:

Statute: Ill. Laws (Sp. sess., 1933-34), pp. 58, 74 (Liquor Control act, art. I, sec. 2 (16); art. VI, sec. 20).

Ordinance: Coun. J. (1933-34), p. 1542 (Retail liquor dealer's ord., sec. 3143K-3143N).

LICENSING OF CLUBS SELLING ALCOHOLIC LIQUOR

(No. 8551—M. H. F.—November 2, 1934—1½ pp.)

Clubs must be licensed to dispense alcoholic liquor and be provided with suitable kitchen and dining room space and equipment. Neither the Mayor nor the City Council may exempt them from the license requirements, regardless of how the profits derived from the sale of liquor are distributed.

Citation:

Statute: Ill. Laws (Sp. sess. 1933-34), pp. 60, 61 (Liquor Control act, art. I, sec. 2, par. 17; art. II).

LICENSE FOR SALE OF NEAR BEER

(No. 8417—City Collector—M. H. F.—June 4, 1934—4½ pp.)

Retail dealers in "near beer," a malt beverage containing not more than one-half of one per cent alcohol by volume, are not required to have either a state or city retail liquor dealer's license.

The city probably has the power to license the retail sale of "near beer."

Citations:

- Statutes:** Cities and Villages act, art. V, sec. 46.
Ill. Laws (Sp. sess. 1933-34), pp. 58, 64 (Liquor Control act, art. I, sec. 2, par. 5; art. IV, sec. 1).
Ordinance: Coun. J. (1933-34), p. 1542 (Liquor licensing ord., sec. 3143-J).
Cases: Chicago v. Murphy, 313 Ill. 98 (1925).
Chicago v. Efantis, 339 Ill. 55 (1930).

LICENSE FOR SALE OF GRAPE SUGAR PRODUCTS

(No. 8366—M. H. F.—April 17, 1934—1½ pp.)

Where a grape sugar product comes within the definition of "alcoholic liquor" in the Illinois Liquor Control act, all distributors of it are required to be licensed under the state law and all persons selling it in Chicago at retail are required to procure both a city and state retailer's license.

Citation:

- Statutes:** Ill. Laws (Sp. sess. 1933-34), p. 96 (Dram Shops act, art. I, sec. 2, par. 5).

LICENSING OF DRUG STORES LIQUOR SALES*

(No. 7447—Mayor—J. F. G.—February 11, 1932—1 p.)

The city has no power to license drug stores nor to control their use of liquor for medicinal purposes.

Citation:

- Case:** Lowenthal v. Chicago, 313 Ill. 190 (1925).

LIQUOR LICENSE FOR DRUG STORES

(No. 8349—Chairman, Committee on License—M. H. F.—March 31, 1934—3 pp.)

Any drug store in the city employing a licensed pharmacist may possess and use alcoholic liquors in the concoction of prescriptions of duly licensed physicians without being subject to the licensing provisions of the ordinances that concern liquor sales.

Citations:

- Statute:** Illinois Liquor Control act, Jan. 31, 1934, art. II, sec. 1, art. IV, sec. 1.
Ordinance: Coun. J. (1933-34), p. 1542, secs. 3143-K, 3143-J, 3143-L.

*See also Opinion No. 6830, p. 371.

LIQUOR LICENSE WHERE OWNERSHIP OF STOCK BY A LAW ENFORCING OFFICER

(No. 8400—City Sealer—M. H. F.—May 21, 1934—3½ pp.)

Although no law prohibits stockholders in a corporation engaged in the business of selling liquor from holding public office, yet when a "law enforcing officer" owns five per cent or more of the stock of a corporation, such corporation "is ineligible to receive a license to sell liquor either from the state or Local Liquor Control Commissioner."

The Inspector of Weights and Measures (City Sealer) is a "law enforcing officer" as that term is defined in the State Liquor Control law.

Citations:

Statute: Ill. Laws (Sp. sess. 1933-34), p. 68 (Liquor Control act, art. VI, sec. 2).

Ordinances: Code '31; 525-537, 2929-57.

LEGISLATOR'S RIGHT TO CONDUCT LIQUOR BUSINESS

(No. 8455—State Representative—M. H. F.—July 6, 1934—2½ pp.)

A state legislator is not a "law enforcing officer" within the meaning of that term as contained in the Illinois Liquor Control law.

A state legislator, as such, is not prevented from lawfully engaging in the business of dispensing liquor.

Citations:

Statute: Ill. Laws (Sp. sess., 1933-34), p. 68 (Liquor Control act, art. VI, sec. 2).

Ordinances: Code '31: 3013-17 (Food Dispensers ord.).
Coun. J. (1933-34), p. 1542 (Retail liquor dealers licensing ord.).

RETAIL LIQUOR DEALER, PAYMENT OF FEDERAL FEE AS EVIDENCE

(No. 8513—Superintendent, Bureau of License—M. H. F.—October 1, 1934—3 pp.)

The payment of a retail liquor dealer's fee to the United States is *prima facie* evidence that the payor is a retail liquor dealer and thus subject to the city's licensing ordinance, but this is subject to being rebutted and overcome by other competent evidence.

Citation:

Ordinances: Coun. J. (1934-35), pp. 2257, 2567.

LICENSING OF THEATRE GIVING AWAY LIQUOR

(No. 8983—Alderman, 4th Ward—M. H. F.—December 20, 1935—
1½ pp.)

When a Chicago motion picture theater, which does not hold both a state and city retail liquor dealer's license possesses and gives away alcoholic liquor with tickets of admission to its theater, it violates both the Illinois Liquor Control act and the city's retail liquor dealers' license ordinance.

SALE OF NON-ALCOHOLIC SET-UPS AFTER HOURS

(No. 8859—Commissioner of Police—M. H. F.—September 3, 1935—
2½ pp.)

The holder of both a liquor license and a food dispenser's license cannot be prosecuted either under the Illinois Liquor Control act or the city's liquor ordinance for selling set-ups of non-intoxicating beverages during the hours the sale of liquor is prohibited.

Citations:

Statute: Ill. Laws (Sp. sess. 1933-34), p. 71 (Liquor Control act, art. VI, sec. 10).

Ordinance: Retail alcoholic liquor ord., sec. 3143-O.

(2) Denial and Revocation of License*

MAYOR'S POWER TO GRANT AND REVOKE LIQUOR LICENSES†

(No. 8982—M. H. F.—December 20, 1935—1½ pp.)

The Mayor may not refuse a license nor revoke a license merely because residents of a neighborhood object to the maintenance of a liquor establishment. The State Liquor Control law and the city's retail liquor dealer's license ordinance are controlling upon the Mayor in the matter of granting, refusing to grant, revoking, or refusing to revoke a retail liquor license.

APPROVAL OF LIQUOR LICENSE PENDING CRIMINAL CHARGES

(No. 8624—Commissioner of Police—M. H. F.—January 12, 1935—
1½ pp.)

Until the police commissioner possesses further information as to whether the persons in question have been found guilty of a crime

*See also Opinion No. 8346, p. 130, on publishing notice of application for liquor license.

†See also Opinion No. 8354, p. 102, on the Mayor as Liquor Control Commissioner.

and what the status of the criminal proceedings is, he should reserve his recommendation that the applications for a liquor license be denied or approved.

APPROVAL OF LIQUOR LICENSE PENDING CRIMINAL CHARGES

No. 8829—Commissioner of Police—R. D. K.—July 25, 1935—1½ pp.)

The Commissioner of Police may withhold approval of an application for a city retail liquor license, when no disposition has been made of serious offenses charged against the applicant, on the grounds that one charged with such offenses is not of good character and reputation in the community in which he resides.

Citation:

Statute: Ill. Laws (Sp. sess., 1933-34), p. 68 (Liquor Control act, art. VI, sec. 2).

DISAPPROVAL OF LIQUOR LICENSE FOR MORAL REASONS

(No. 8645—Commissioner of Police—M. H. F.—January 24, 1935—2 pp.)

It is a sufficient reason for the Commissioner of Police to recommend that an application for a liquor license be disapproved and a license be refused, where the applicant has been shown not to be of good moral character, has harbored persons of questionable repute in his tavern, and improper relations between these people have been alleged to have taken place therein.

DISAPPROVAL OF LIQUOR LICENSE FOR EMPLOYMENT OF MINORS

(No. 8644—Commissioner of Police—M. H. F.—January 24, 1935—1½ pp.)

The Commissioner of Police has sufficient reason to recommend to the Mayor that an application for a retail liquor dealer's license for 1935 be disapproved, where in 1934 the liquor licensee employed a girl of fifteen, then on probation under orders of a probation officer, as hostess in his tavern.

Citation:

Statute: SH '33, 48: 26.

DISAPPROVAL OF LIQUOR LICENSE, FAILURE TO REPORT SHOOTING

(No. 8643—Commissioner of Police—M. H. F.—January 24, 1935—1 p.)

The Commissioner of Police may properly concur in the recommendation that no 1935 retail liquor dealer's license be issued to persons who in 1934 as liquor licensees, instead of reporting a shooting that took place on their premises to the police, locked up their premises and remained out of touch with the police, since this is ample evidence of their lack of good character.

DISAPPROVAL OF LIQUOR LICENSE FOR VIOLATIONS OF LAW

(No. 8618—Commissioner of Police—M. H. F.—January 10, 1935—1½ pp.)

The police commissioner may properly recommend the disapproval of an application for a 1935 liquor license by a person whose report shows evidence that he had kept the place open after hours and that he was arraigned for disorderly conduct in refusing to close the place and in resisting arrest. The fact that this person was discharged or found to be not guilty by the court, is not conclusive that the offenses were not committed.

Citations:

Ordinances: Code '31: 4210.

Coun. J. (1933-34), p. 407 (Retail dealer's liquor license ord., sec. 3143-O).

DISAPPROVAL OF LIQUOR LICENSE FOR INDECENT PERFORMANCE

(No. 8622—Commissioner of Police—M. H. F.—January 11, 1935—1 p.)

The police commissioner may properly recommend the disapproval of an application for a 1935 liquor license which is submitted by a person who was convicted of the crime of presenting an indecent performance in his retail liquor dealer's establishment.

Citation:

Statutes: Ill. Laws (Sp. sess., 1933-34), p. 68.
Criminal Code, sec. 470.

NEW LIQUOR LICENSE FOR PREMISES AFTER REVOCATION

(No. 8758—*M. H. F.*—May 2, 1935—1½ pp.)

When a liquor license has been revoked, a new liquor license for the same premises can not be issued to anyone until one year has elapsed.

Citation:

Statutes: Ill. Laws (Sp. sess., 1933-34), pp. 71, 80 (Liquor Control act, art. VI, sec. 12, art. VII, sec. 10).

REFUND AFTER LIQUOR LICENSE REVOCATION

(No. 8930—*Chairman, Committee on Finance—M. H. F.*—November 18, 1935—1½ pp.)

The cancellation, due to the misconduct of the holders, of a receipt for money deposited in connection with the retailer's liquor license, is the equivalent of a formal revocation of the license, and no refund should be made.

LIQUOR LICENSE REVOCATION IF LEASE EXPIRES

(No. 8731—*Commissioner of Police—M. H. F.*—March 27, 1935—2½ pp.)

The expiration of a liquor licensee's lease is sufficient reason for the revocation of his license, but he should first be given a hearing by the Mayor or the Deputy Liquor Control Commissioner. A liquor licensee must either own the licensed premises or have a lease on them for the entire license period.

**LICENSE REVOCATION OF LIQUOR ESTABLISHMENT
WITHOUT CLEAR VIEW FROM STREET**

(No. 8788—*Commissioner of Police—M. H. F.*—June 6, 1935—3½ pp.)

A liquor licensee who does not provide a clear view from the street into his establishment should be prosecuted under the State Liquor Control law, not under the city ordinances.

When the Commissioner of Police is satisfied as to the facts that a liquor licensee wilfully altered the interior of his establishment so as to shut off a clear view from the street, he may properly concur in the recommendation to the Mayor that the liquor license be revoked.

Citations:

Statutes: Ill. Laws (Sp. sess. 1933-34), pp. 74, 76 (Liquor Control act, art. VI, sec. 20; art. VII, sec. 5).

Ordinances: Coun. J. (1933-34), p. 1128 as amended, p. 1542 (Retail liquor licensing ord.).

CAUSES FOR LICENSE REVOCATIONS—HARBORING DISREPUTABLE CHARACTERS

(No. 8650—*Commissioner of Police—M. H. F.—January 26, 1935—*
2½ pp.)

The cause for the revocation of a liquor license should be stronger than that shown for the mere refusal to grant a license, due to the drastic results which follow the revocation of a liquor license. The fact that a liquor licensee harbored a few disreputable characters in his tavern and permitted their disorderly conduct therein, is not sufficient reason for recommending the revocation of his license. Police should, however, keep the tavern under surveillance for any future violations of law, or continued permitting of disorderly conduct.

SEVERITY OF LICENSE REVOCATION, MINOR INFRACTIONS OF LAW

(No. 8664—*Commissioner of Police—M. H. F.—February 5, 1935—*
1½ pp.)

A retail liquor licensee who has committed minor infractions of law should be prosecuted under the penalty provisions of whatever law or ordinance he has breached, but his license should not be revoked, unless sufficient cause be shown, due to the harsh consequences of revocation.

Where, after notice, a licensee still refuses to conduct his establishment properly, resort should be had to revocation proceedings.

Citation:

Ordinance: Code '31: 4210.

License Appeal: An appeal from a revocation of a liquor license under the Dramshop act must be made within twenty days from the date of the decision of the License Appeal Commission.—*Natali case*, Cook County Circuit Court (May 14, 1935) No. 35-C-5766.

EFFECT OF TRANSFER OF TAVERN UPON BANNED OWNER THEREOF

(No. 7258—*City Collector—L. H.—November 5, 1931—3 pp.*)

The granting of a liquor license to another person to operate certain premises that have been under ban, does not act to remove the ban against the person who formerly operated the premises and to permit the issuance of a license to him.

LIQUOR LICENSE REVOCATION, PRESENCE OF PROSTITUTES

(No. 8853—Commissioner of Police—M. H. F.—August 21, 1935—
2½ pp.)

The presence of one prostitute, or the fact that one woman accosted one man in a tavern, does not make the tavern a rendezvous for questionable women, and until it is clearly established that the tavern is frequented by prostitutes, the Commissioner of Police should not recommend the revocation of the tavern's liquor license.

Citations:

Statute: SH '35, 38: 163.

Ordinance: Code 31: 4215.

**LIQUOR LICENSE REVOCATION, HARBORING OF
PROSTITUTES**

(No. 8907—Commissioner of Police—M. H. F.—November 1, 1935—
2 pp.)

No recommendation for the revocation of a retail liquor dealer's license should be made where licensee's employee-in-charge allowed prostitutes to hide in the tavern at the approach of the police and where prostitutes have been found loitering in the tavern because no violation of state law or city ordinance is charged against the licensee, the employee of the licensee was not convicted of the charge made against him, and the evidence does not clearly establish the fact that the licensee knowingly harbored prostitutes.

Citation:

Ordinance: Code '31: 4210.

**LIQUOR LICENSE REVOCATION, CRIME BY LICENSEE'S SON
ON PREMISES**

(No. 8797—Commissioner of Police—M. H. F.—June 18, 1935—3½
pp.)

The fact that the son of a liquor licensee was employed and committed a crime in the licensee's tavern is not sufficient to warrant the Commissioner of Police to concur in the recommendation that the liquor license be revoked, since the crime was not committed with the knowledge and approval of the licensee and was not a violation of the Liquor Control act.

Citation:

Statute: Ill. Laws (Sp. sess. 1933-34), p. 91 (Liquor Control act, art. X. secs. 3, 5).

LIQUOR LICENSE REVOCATION FOR ORDINANCE AND STATUTE VIOLATIONS

*(No. 8849—Commissioner of Police—M. H. F.—August 15, 1935—
3 pp.)*

The Commissioner of Police would not be warranted in recommending the revocation of the liquor license of a person, who was charged with selling cigarettes without a license (the case having been nolle prossed), who has already been punished for the unlawful sale of fireworks, and who is being punished for possessing alcohol on which the tax had not been paid, as the person has not been guilty of any violation of the State Liquor Control law, of the city's retail dealer's license ordinance or of any other law or ordinance relating to alcoholic liquor.

Citation:

Statute: Ill. Laws (Sp. sess. 1933-34), pp. 65, 68, 76, 80 (Liquor Control act, art. IV, sec. 3, par. 1; art. VI, sec. 2; art. VII, secs. 3, 6, 9, 10).

LIQUOR LICENSE REVOCATION, FAILURE TO OBTAIN AMUSEMENT LICENSE

(No. 8807—Commissioner of Police—M. H. F.—July 1, 1935—1½ pp.)

A retail liquor dealer's license should not be revoked for not having a public place of amusement license, when the licensee has been fined for this and there are no specific violations of the State Liquor Control law or the city's retail liquor dealers' ordinance.

Citation:

Ordinance: Code '31: 1903.

LIQUOR LICENSE REVOCATION WHEN MANAGER INELIGIBLE

*(No. 8975—Commissioner of Police—M. H. F.—December 19, 1935—
1½ pp.)*

A city retailer's alcoholic liquor license may be revoked if issued to one whose place of business is conducted by a manager who is ineligible to receive a liquor license.

LIQUOR LICENSE REVOCATION WHEN MANAGER OR AGENT INELIGIBLE

(No. 8945—*Commissioner of Police—M. H. F.—November 22, 1935—1½ pp.*)

A city retailer's alcoholic liquor license may not be issued to a person whose place of business is conducted by a manager or agent unless such manager or agent possesses the same qualifications as is required of a licensee.

If it can be shown that the licensee procured a city retailer's liquor license with the intention that her husband, a person ineligible to a license, was to operate the tavern and that he was in fact active in the management of the tavern, the Commissioner of Police would be justified in concurring in the recommendation of the district commander that the license be revoked.

An applicant for a city retailer's license who has a criminal record is ineligible to receive such license.

LIQUOR LICENSE REVOCATION, LIQUOR SALE TO MINORS

(No. 8805—*Commissioner of Police—M. H. F.—June 26, 1935—4½ pp.*)

Charges against persons selling liquor to minors should be preferred under section 12 of art. VI of the state liquor law.

A recommendation by the Commissioner of Police that the liquor license of a person who sold liquor to minors be revoked would not be improper if he is satisfied that the officers making the investigation can establish by their testimony and the testimony of the minors involved that alcoholic liquor was so being served.

It might be better to recommend to the Mayor that the liquor license should not be renewed, rather than to revoke it, where the end of the license period is near, as it would be easier to sustain such a refusal than to uphold the revocation.

Citations:

- Statute: Ill Laws (Sp. sess. 1933-34), pp. 71, 76, 91 (Liquor Control act, art. VI, sec. 12; art. VII, sec. 5; art. X, secs. 3, 5).
Ordinances: Coun. J. (1933-34), p. 1542.
Id. (1933-34), p. 1128.

**LIQUOR LICENSE REVOCATION, SHOOTING AND DICE GAME
IN TAVERN**

(No. 8632—*Commissioner of Police—M. H. F.—January 18, 1935—*
1½ pp.)

Where the police commissioner is satisfied that the business partner of a liquor licensee was guilty of shooting a man on the premises and that shooting was not promptly reported to the police by the licensee, the police commissioner may properly recommend to the Mayor that his license be revoked.

The fact that the liquor licensee admitted he allowed a crap game to be run in the basement of his tavern is an aid in supporting the Mayor's action in revoking the license.

LIQUOR LICENSE REVOCATION, HARBORING OF CRIMINALS

(No. 8670—*Commissioner of Police—M. H. F.—February 13, 1935—*
1½ pp.)

Where a liquor licensee can be shown to have knowingly harbored members of a criminal gang in his tavern, the police commissioner can properly concur in district commander's recommendation that his license be revoked.

**LIQUOR LICENSE REVOCATION, VIOLATION OF LIQUOR
CONTROL LAWS**

(No. 8615—*Commissioner of Police—M. H. F.—January 7, 1935—2*
pp.)

The revocation of a retail liquor dealer's license, a public place of amusement license and a food dispenser's license, all of which have been issued to a certain party for a given premises, is proper where that party has violated the liquor control provisions of the state law or of a city ordinance. But the revocation of a cigarette license for the same premises which was issued to different persons should be rescinded, since the law violation has not been committed by them, but by another licensee over whom they have no control.

LIQUOR LICENSE REVOCATION, GAMBLING, PROSTITUTION, AND OTHER VIOLATIONS

(No. 8991—*Commissioner of Police—M. H. F.—December 28, 1935—1 p.*)

The Commissioner of Police may concur in the recommendation of the district commander that a liquor license should be revoked if it can be shown that the licensee knowingly permitted prostitutes to solicit in her tavern, that she sold cigarettes without a cigarette dealer's license, kept gambling devices for the use of her patrons, and had upon the premises alcoholic liquor for which no tax had been paid.

E. OTHER SUBJECTS OF LICENSE

AMBULANCE LICENSE FOR CARS OF PRIVATE HOSPITALS

(No. 8728—*Superintendent, Bureau of License—M. H. F.—March 23, 1935—3 pp.*)

Ambulances operated by privately owned hospitals are private ambulances and must be licensed as required by the city's private ambulance licensing ordinance.

Citations:

Ordinance: Code '31: 2342-2351.

Case: Harder's Storage Co. v. Chicago, 235 Ill. 58 (1908).

ISSUANCE OF AMUSEMENT LICENSE*

(No. 7095—*City Clerk—C. J. A.—August 27, 1931—1 p.*)

Until the City Clerk receives a recommendation of the City Collector for the issuance of an amusement license, he is not required to act in the matter.

AMUSEMENT LICENSE FOR CHARITABLE AND EDUCATIONAL PURPOSES

(No. 7239—*Superintendent, License Department—J. F. G.—October 30, 1931—2 pp.*)

Entertainments for charitable and educational purposes do not require amusement licenses.

Citations:

Ordinance: Code '31: 1893, 1894.

Other reference: Opinion No. 6808 (this volume, p. 501).

*See also Opinion No. 8207, p. 462, on amusement license fees and Opinion No. 7803, p. 583, on frontage consents for amusements.

AMUSEMENT LICENSE FOR PIANO IN A TAVERN

(No. 8478—*M. H. F.*—*July 19, 1934*—*1½ pp.*)

The placing of a piano in a tavern to be used only by patrons and not by a salaried entertainer does not subject the owner to the license requirements of the city's public place amusement ordinance, unless the patrons engage in dancing to the music offered by the piano.

Citation:

Ordinance: Code '31: 1908.

AMUSEMENT LICENSE FOR CARD GAMES

(No. 7884—*W. V. D.*—*January 5, 1933*—*1 p.*)

An amusement license is necessary when a person rents card tables to the general public in a place where an admission is charged.

No ordinance prohibits the playing of cards where no awards in cash or merchandise are given, but the playing of cards for money where such constitute games of chance is prohibited.

Citation:

Ordinance: Code '31: 1939.

AMUSEMENT LICENSE FOR NIGHT CLUBS—REGULATION OF PRIVATE CLUBS

(No. 7882—*City Solicitor of Cuyahoga Falls, Ohio*—*W. V. D.*—*January 5, 1933*—*5½ pp.*)

So-called "night clubs" are deemed public places of amusement and are subject to the amusement ordinances.

Private clubs or clubs where the general public is not admitted and an admission fee is not charged are subject only to restrictive ordinances which operate against an individual.

Citation:

Ordinances: Code '31: 1908-14, 4185-86.

AMUSEMENT LICENSE FOR CIVIC OPERA AND CIVIC THEATER*

(No. 6808—*Superintendent, Department of License*—*E. P. M.*—*December 1, 1930*—*3½ pp.*)

As the Civic Opera and the Civic Theater are not being conducted for profit, the Chicago Civic Opera Company is not required to procure amusement licenses for them.

Citation:

Ordinance: Code '22: 176, 177.

*See also Opinion No. 8152, p. 467.

AMUSEMENT LICENSE FOR CAFE PRESENTING FLOOR SHOW

(No. 8252—*C. N.*—December 22, 1933—1½ pp.)

A cafe must be licensed as a public place of amusement if the public is permitted to witness any kind of floor show or to engage in dancing.

Citation:

Ordinances: Code '31: 1906, 1908-14.

**AMUSEMENT LICENSE FOR RESTAURANTS—REFUND OF
AMUSEMENT LICENSE FEE**

(No. 8985—*Secretary to the Mayor—M. H. F.*—December 21, 1935—4 pp.)

Where entertainment is furnished by way of songs of a paid singer and card or other games are provided for the customers in a place serving food and drink to the public, it is properly subject to the requirements of the public place of amusement license.

If a person operates a public place of amusement in advance of receiving a license and during a portion of the period for which a license is sought, he is not entitled to a refund of the license fee deposited when the license is refused.

Citations:

Ordinances: Code '31: 1908-09, 2900.

Case: *Chicago v. Green Mill Gardens*, 305 Ill. 87 (1923).

HOCKEY AND BASKETBALL AS AMUSEMENTS*

(No. 7411—*City Comptroller—L. H.*—January 12, 1932—2½ pp.)

Hockey games and basketball games are amusements of the tenth class, and the license fee exacted should be that which is required for that class.

Citations:

Ordinances: Code '31: 1893.

Coun. J. (1930-31), p. 4894 (Athletic exhibitions).

**MINIATURE GOLF AS AMUSEMENT—LICENSING OF
ATHLETIC CONTESTS AND EXHIBITIONS**

(No. 6831—*Chairman, Committee on Parks, Playgrounds, Aviation and Athletics—M. H. F.*—January 24, 1931—3½ pp.)

The majority of miniature golf courses are places of amusement rather than establishments where athletic contests and exhibitions are held.

*See also opinion No. 7443, p. 463.

The game of Hy Ly is an "athletic contest or exhibition" as contemplated by the City Code.

"Other athletic contests and exhibitions," as used in the twenty-first class under chapter eight of the 1922 Code, includes all other athletic contests and exhibitions, which are not specifically mentioned in the preceding twenty classes.

Citations:

Ordinances: Code '22: 176, 181.

Statute: SH '29, 24: 41.

AMUSEMENT LICENSE FOR FIREWORKS DISPLAY

(No. 6982—*Mayor—L. H.—July 2, 1931—3 pp.*)

A pyrotechnic display of fireworks at an amusement park operated for profit is an amusement of the twentieth class, and not a public display of fireworks. The amusement park, therefore, must pay a fee and obtain a license for the display.

Citation:

Ordinances: Code 22: 176, 1229-30.

DEALERS IN SMALL ANIMALS—SALE OF DOGS

(No. 7694—*Superintendent, Bureau of License—C. J. A.—August 5, 1932—4 pp.*)

Any person who makes a regular business of selling dogs in the Maxwell street market must obtain a city dealer's license for the sale of small animals.

Citations:

Ordinances: Code '31: 834, 3167, 3170.

Cases: Brown v. United States, 298 Fed. 177 (1924).

Groves v. Slaughter, 40 U. S. 449, 506 (1841).

Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 Pac. 248 (1888).

Other references: Webster's Dictionary, "merchandise."

Bouvier's Law Dictionary (Rawle's 3rd rev.) "merchandise."

40 CJ 642.

AUCTIONEER'S LICENSE FOR PHILANTHROPIC PURPOSES

(No. 7961—*L. H.—March 7, 1933—3 pp.*)

Only licensed auctioneers may conduct public auctions held either for private or for philanthropic purposes.

Citations:

Ordinances: Code '31: 3206, 3212.

Case: Chicago v. Arnstein, 323 Ill. 258 (1927).

AUCTIONEER'S LICENSE FOR SALE OF OWN PROPERTY

(No. 8555—*M. H. F.*—November 9, 1934—1½ pp.)

No one may sell his own goods at a public auction without obtaining an auctioneer's license.

Citation:

Ordinance: Code '31: 3201.

APPOINTMENT OF LICENSED AUCTIONEER'S ASSISTANT

(No. 7463—*L. H.*—February 26, 1932—2½ pp.)

The ordinances of the city relating to auctions and auctioneers do not permit a licensed auctioneer to designate anyone, except his own partner or a clerk employed by him, as his assistant auctioneer.

Citations:

Ordinances: Code '31: 3206, 3208.

Opinion No. 7476 of March 2, 1932, discusses the same point as the above opinion.

**AUCTIONEER'S LICENSE FOR SALE OF UNCLAIMED GOODS
OF EXPRESS COMPANY**

(No. 7672—*Mayor*—*L. H.*—July 28, 1932—2 pp.)

An express company selling unclaimed goods at an auction in accordance with the state law is required by ordinance to make the sales through a licensed auctioneer.

Citation:

Ordinance: Code '31: 3201-24.

**AUCTIONEER'S LICENSE FOR SALE OF ANIMALS—SALES
STABLE LICENSE FOR SALE OF HORSES**

(No. 7867—*Superintendent, Bureau of License*—*M. H. F.*—December 29, 1932—3½ pp.)

The City Council did not intend the auctioneer license ordinance should cover animate objects, such as horses, and a person selling horses at auction sales does not have to procure an auctioneer's license.

A sales stable license is required for the operation of a business where the source of profit is derived from the buying and selling of horses in a barn or stable.

Citations:

Ordinances: Code '31: 3174, 3201.

Cases: Von Patten v. Leonard, 55 Iowa 520, 8 N. W. 334 (1881).
Chicago and Aurora Railway v. Thompson, 19 Ill. 577, 583 (1857-58).
St. Joseph Hydraulic Co. v. Wilson, 133 Ind. 465, 33 N. E. 113 (1893).

Other references: 1 Bouvier's Law Dictionary (Rawle's 3rd Rev.) 1365, "goods."
4 Words and Phrases 3132, "goods."

BAKERY ESTABLISHMENT AND BAKERY VEHICLE

(No. 6769—*Chairman, Committee on Finance—M. H. F.—September 16, 1930—3 pp.*)

The bakery establishment license ordinance is valid and fees collected for that purpose can not be recovered by a taxpayer.

The bakery vehicle license ordinance has been declared invalid, but license fees paid under the ordinance cannot be recovered unless they have been paid under protest and duress.

Citation:

Case: *Ward Baking Co. v. Chicago*, 340 Ill. 212 (1930).

BAKERY VEHICLES

(No. 6784—*Commissioner of Health—M. H. F.—September 30, 1930—1½ pp.*)

The bakery vehicle license ordinance was held invalid because it lacked any inspection and regulation requirements applicable to bakery vehicles, but if the ordinance were amended to provide for adequate inspection and regulation of these vehicles, it would probably be sustained by the courts.

Citation:

Case: *Ward Baking Co. v. Chicago*, 340 Ill. 212 (1930).

Opinions No. 6782 of September 30, 1930, to the Superintendent of the Department of License, and No. 6783 of September 30, 1930, to the Secretary, Commission on Revenue, are in accord with the above opinion.

Sections 3038-44 dealing with the licensing of bakeries and bakery vehicles were amended December 1, 1931.—Coun. J. (1931-32), p. 1361.

BAKERY VEHICLE LICENSE REQUIREMENTS

(No. 8233—*M. H. F.—December 8, 1933—4 pp.*)

Bakery vehicles which deliver bakery goods within the city from the Chicago factory must each obtain a bakery vehicle license.

Citations:

Ordinances: Code '31: 3038-39 as amended, Coun. J. 1931-32, p. 1361.

Barbers and Barber Shops: The city is authorized to license and regulate barbers and barber shops.—Ill. Laws (1935), p. 353.

BEAUTY PARLORS AND SCHOOLS

(No. 8692—*M. H. F.—March 6, 1935—1½ pp.*)

The passage of the Illinois Beauty Culture act impliedly repealed the city's cosmetic and physical therapeutic establishment ordinances

and until that act is amended or repealed, the city has no power to enforce regulations over beauty parlors or beauty schools.

Citations:

Statutes: SH '33, 16¾: 15-32.

Case: Chicago v. Jensen, 331 Ill. 129 (1928).

BEAUTY PARLORS AND SCHOOLS*

(No. 8713—*M. H. F.*—March 14, 1935—1 p.)

Before the City Council could pass and enforce an ordinance to take the place of its former beauty parlor and beauty school licensing ordinance, which has been declared invalid, it would be necessary for the state legislature to amend its Beauty Culture act so as to enable cities having a population of 500,000 or more inhabitants to legislate in the same field.

DEALERS IN MALT AND VINOUS BEVERAGES—EFFECT OF PROHIBITION REPEAL†

(No. 8077—*Mayor—L. H.*—May 22, 1933—7½ pp.)

No ordinances are in force in the city which prohibits the licensing of persons who desire to sell malt or vinous beverages of alcoholic content not exceeding 3.2 per cent in weight, but the charter provisions of educational institutions for prohibition areas remain as they have been in the past.

The repeal of the Illinois Prohibition act wiped out all liquor legislation then in effect in the state and all ordinances passed under the authority of the former acts which were repealed by the Prohibition act.

Citations:

Statutes: Annexation act, sec. 18.

Local Option act (1907).

Cities and Villages act, art. V, sec. 46.

Malt and Vinous Beverage act April 21, 1933, secs. 3, 17.

Dram Shop act (1874), sec. 1.

Cases: Hewitt v. People, 186 Ill. 336 (1900).

People v. Williams, 309 Ill. 492 (1924).

People v. Alfano, 322 Ill. 384 (1927).

Peisner v. Chicago, 318 Ill. 131 (1925).

Chicago v. Murphy, 313 Ill. 98 (1925).

*See also Opinion No. 6591, p. 515.

†See also Opinion No. 8417, p. 489, on the licensing of the sale of near beer or malt beverages.

SALE OF BEVERAGES LESS THAN ONE-HALF OF ONE PER CENT ALCOHOLIC CONTENT

(No. 8840—City Collector—M. H. F.—August 9, 1935—2 pp.)

The sale of a beverage containing less than one-half of one per cent of alcohol by volume is not subject to license by either the city or the state.

Citations:

Statutes: Ill. Laws (Sp. Sess. 1933-34), p. 58 (Liquor Control act, art. I, sec. 1, par. 5).

Ordinance: Alcoholic Liquor ord., sec. 3143-J.

LICENSING MANUFACTURERS AND WHOLESALE DEALERS IN MALT AND VINOUS BEVERAGES

(No. 8220—Chairman, Subcommittee on Malt Beverage Licenses—M. H. F.—November 20, 1933—3 pp.)

The City Council may pass an ordinance licensing and regulating manufacturers and wholesale dealers in malt and vinous beverages for the month of December, 1933. That the license period is less than a calendar year should not affect the validity of the ordinance.

The City Council may prohibit applicants for malt and vinous beverage licenses in 1934 and subsequent years from procuring those licenses without first paying any beverage license fees to which they were subject for December, 1933.

Citations:

Statute: SH '33, 43: 76.

Ordinance: Code '31: 2915.

Retail Beverage Dealers: A City ordinance (Code '22: 3464) requiring a license before one is allowed to engage in the business of selling at retail for consumption on the premises of "any malted, cereal or vinous, non-intoxicating beverage" is valid and applies to one who occasionally sells such products.—*Chicago v. Efantis*, 339 Ill. 55 (1930).

This ordinance was omitted from the 1931 Code and enacted December 11, 1931 (Coun. J., 1931-32, p. 1147) as sections 3143A-F but was repealed November 28, 1933 (Coun. J., 1933-34, p. 1128).

RETAIL BEVERAGE DEALER'S LICENSE FOR SEPARATE PLACES

(No. 8199—Superintendent, Bureau of License Enforcement—J. F. G. and M. H. F.—November 2, 1933—9 pp.)

The City Council intends that the words "each stand, place, room or enclosure" in the Retail Beverage ordinance should refer to each

stand, place, room or enclosure which may be considered as a separate place, at which malt or vinous beverages are to be sold at retail.

Only one license is required for a store or shop comprised of two contiguous stores physically thrown together and operated by one proprietor as one place selling malt or vinous beverage.

Separate licenses would be required where two or more places selling malt or vinous beverages located under the same roof or at one address, are operated by the same person but are so distinct in location, character, and clientele as fairly to be considered separate premises.

Citations:

Statutes: SH '33, 43: 74-93.

Ordinance: Code '31: 3143-B.

Case: *Malkar v. Chicago*, 217 Ill. 471, 481 (1905).

Administrative Rule: Dept. of Finance, Malt and Vinous Beverage Regulations, art. V (Sept. 1, 1933).

RETAIL BEVERAGE DEALER'S LICENSE, FOR SEPARATE PLACES IN BUILDING*

(No. 8202—*Superintendent, Bureau of License Enforcement—J. F. G. and M. H. F.—November 3, 1933—5 pp.*)

Three stores selling beer at retail which are owned by the same proprietor and located in different parts of the same building must each have a retail beverage license.

Each stand, place, or room where beer is sold at retail, even though it does not have its own drawing, storing, and icing facilities, must have a retail beverage license.

Only one retail beverage license is required for two adjoining and connected stores if beer dispensing facilities are set up in only one of them.

Only one retail beverage license is required for a store with a partition separating the front and rear parts of the store but with an opening allowing passage between the two parts of the store if only one beer dispensing unit is used.

Citations:

Ordinance: Code '31: 3143-B.

Other reference: Opinion No. 8199 (this volume, p. 507).

*See annotation "Retail Beverage Dealers" on the repeal of the Retail Beverage Dealers' License ordinance, p. 507.

BEVERAGE LICENSE FOR PRIVATE CLUBS*

(No. 6944—*Acting Commissioner of Police—C. J. A.—June 11, 1931—3½ pp.*)

A club which sells beer to its members, even though it may not sell to any other persons and conducts its sales behind closed doors, is required to obtain a class A beverage license.

Citations:

Ordinances: Code '22: 3464-66.

Case: People v. Law and Order Club, 203 Ill. 127 (1903).

BEVERAGE LICENSES FOR RESTAURANTS SERVING MALT BEVERAGES—SOFT DRINK PARLORS*

(No. 6419—*Superintendent of License—L. H.—March 26, 1929—2 pp.*)

The beverage license provisions of the City Code can be enforced against restaurants that serve malt beverages.

A class B beverage license cannot be required of a person or company conducting a business other than a soft drink parlor.

Citations:

Ordinance: Code '22: 3465 (Beverage license ord.).

Cases: Chicago v. Murphy, 313 Ill. 98 (1925).

Kincaid v. Vecchi, 332 Ill. 586 (1929).

BEVERAGE—DISPENSING MACHINES*

(No. 6438—*Commissioner of Police—J. W. B.—May 28, 1929—3½ pp.*)

A firm which installs beverage-dispensing machines to vend beverages for consumption at the machine is engaged in selling soft drinks or beverages at retail and must obtain a retail beverage dealer's license for each machine it installs within the city.

Citation:

Ordinances: Code '22: 3464-66.

WAIVERS OF RETAIL BEVERAGE DEALERS BOND*

(No. 8081—*City Comptroller—C. N.—May 29, 1933—3 pp.*)

The Comptroller, acting in a ministerial capacity, has no authority to waive or abridge the essential requirements regarding the executing of a bond by a retail beverage dealer.

Proof of the superior financial condition of the applicant or the placing of government securities in escrow may not be substituted for the execution of the bond.

Citation:

Ordinance: Coun. J. (1932-33), p. 3183.

*See annotation "Retail Beverage Dealers," p. 507, on the repeal of the Retail Beverage Dealers' License ordinance.

EFFECT OF AMENDING MERGED LICENSE PRIVILEGES OF BEVERAGE DEALERS, FOOD DISPENSERS AND PLACE OF AMUSEMENT

(No. 8170—*Superintendent, Bureau of License Enforcement—M. H. F.*
—September 8, 1933—5½ pp.)

Since the beverage dealer's ordinance in force in the first half of 1933 conferred no privileges beyond June 30, 1933, the merged public place of amusement, beverage dealers and food dispenser's license gave no licensed privileges for dispensing beverages beyond June 30, 1933, but the merged license did give the person licensed the privilege of dispensing food and operating an amusement place for the balance of 1933, regardless of the recent ordinance amending the merged public place of amusement ordinance and requiring three separate licenses.

Citations:

Ordinances: Code '31: 1913, 3015, 3143.

Coun. J. (1933-34), pp. 836, 851.

BILLIARD ROOM, MINIATURE TABLES

(No. 7257—*Chairman, Committee on Parks, Playgrounds, Aviation and Athletics—S. A. M.*—November 5, 1931—1 p.)

Miniature billiard tables, used exactly as the large tables and of the same construction, are within the licensing provisions regulating the operation of billiard rooms.

Citations:

Ordinances: Code '31: 1936, 1939.

BILLIARD ROOM LICENSE, EXEMPTION OF Y. M. C. A.

(No. 7004—*C. J. A.*—July 13, 1931—2½ pp.)

The Y. M. C. A. is a charitable organization within the meaning of the ordinance requiring a license for the operation of a billiard room and need not obtain such a license.

Citations:

Ordinances: Code '31: 1933.

Other references: Op. Corp. Counsel (1916-19), p. 610.

BROKERS

(No. 8280—*M. H. F.*—January 22, 1934—3½ pp.)

The city's power to license and regulate brokers is provided by the Cities and Villages act and does not conflict with the state act for the regulation and registration of real estate brokers and salesmen. Con-

tracts made by a broker who fails to procure a license under the city's ordinance might be jeopardized by this failure.

Citations:

Statute: Cities and Villages act, art. V, sec. 91.

Cases: Banta v. Chicago, 172 Ill. 204 (1898).

Braun v. Chicago, 110 Ill. 186 (1884).

Wilkie v. Chicago, 188 Ill. 444 (1900-01).

Hargood v. Yellow Cab Co., 320 Ill. 317 (1926).

GENERAL BROKERS LICENSE, MERCHANDISE BROKERS

(No. 7191—City Council—L. H.—October 15, 1931—1 p.)

All persons, firms, or corporations doing a merchandise broker's business are now licensed under the general brokers ordinance. Hence, separate provisions for merchandise brokers in the code serve no useful purpose, are unnecessary and confusing, and should be repealed.

Citations:

Ordinances: Code '31: 3336-40.

Case: Lineham v. Chicago, 227 Ill. App. 255 (1922).

Merchandise Brokers: The ordinances dealing with licensing of merchandise brokers (Code '31, secs. 3331-40) was repealed October 21, 1931 (Coun. J., 1931-32, p. 1028).

GENERAL BROKERS LICENSE, PERSON CHARGING COMMISSION FOR PROPERTY LOANS

(No. 6781—C. J. A.—September 29, 1930—1½ pp.)

A person who places loans on personal property and charges a commission for them comes within the definition of a "general broker," and must pay the annual license fee for general brokers.

Citation:

Ordinances: Code '22: 374, 378.

INSURANCE BROKERS*

(No. 7100—Superintendent, Department of License—L. H.—August 29, 1931—2 pp.)

While state laws may require a person licensed as an insurance broker under city ordinance to have a state license, they do not preclude the imposition of a license fee by the city.

Citation:

Statute: Ill. Laws (1931), pp. 619, 624.

*See also Opinion No. 6729, p. 455.

LICENSING OF MONEY LENDERS, AS BROKERS*

(No. 7291—*Secretary, Commission on Revenue—C. J. A.—November 13, 1931—1½ pp.*)

Money lenders (or "loan sharks") coming within the definition of "money changers" or brokers, are subject to license and regulation by the city and are required by the City Code to obtain a license.

Citations:

Statute: SH '31, 24: 65.90.

Ordinance: Code '31: 3314.

PRIMA FACIE EVIDENCE OF REAL ESTATE BROKERAGE

(No. 6933—*Acting Superintendent, Department of License—M. H. F.—June 5, 1931—3½ pp.*)

When an individual takes out a state real estate broker's license, maintains an office in the city for transacting real estate business, displays a sign "Real Estate" on his door, and causes or allows his name to be printed in the classified directory among persons acknowledged to be in the real estate brokerage business, there is *prima facie* evidence that the individual is subject to the Real Estate Broker's License ordinance.

Citation:

Ordinances: Code '22: 382, 383.

Brokers in Interstate Commerce: One who takes orders in the city for certain lumber mill owners of another state and only these, for lumber to be shipped by the mills to the purchaser in Chicago, the purchaser paying the mills, which in turn pay the agent his commission, and the agent having no personal knowledge of the shipment of lumber from the mills, is engaging in interstate commerce and is not subject to any licensing ordinance of the city.—*Chicago v. Dollarhide*, 255 Ill. App. 350 (1930).

Brokers, Manufacturers' Agents: Under its General Brokers Licensing ordinance, the city does not have power to regulate manufacturers' agents.—*Chicago v. Dollarhide*, 255 Ill. App. 350 (1930).

Brokers of Transportation: An ordinance licensing brokers of motor vehicle transportation was passed July 11, 1934 (Coun. J. 1934-35, p. 2583).

CLOSING-OUT SALES IN CHAIN STORES†

(No. 8231—*City Clerk—M. H. F.—December 7, 1933—3½ pp.*)

A separate license must be obtained for each store of a chain of stores that is conducting a closing-out sale.

Citations:

Statute: SH '33, 121½: 149.

Case: *People v. Yonker*, 351 Ill. 139 (1933).

Other reference: Opinion No. 7869 (this volume, p. 457).

*See also Opinion No. 7160, p. 435, on regulation of loan agencies.

†See also Opinion No. 7869, p. 457.

CHAUFFEUR'S LICENSE, EMPLOYMENT FOR VEHICLE OPERATION

(No. 6554—*Commissioner of Police—M. H. F.—December 3, 1929—3 pp.*)

A chauffeur's license must be obtained for any person who is required as a part of his employment to operate his employer's motor vehicle.

Citations:

Statute: SH '29, 121: 27, 29 (Illinois Motor Vehicle act).

Other Reference: Op. Ill. Atty. Gen., Nov. 19, 1929.

CIGARETTE SALES*

(No. 7420—*Superintendent, Department of License—C. J. A.—January 16, 1932—2 pp.*)

Unless a company in the city sells all of its cigarettes outside the state, it is subject to the city's cigarette license fee.

Citations:

Cases: Robbins v. Shelby County Taxing District, 120 U. S. 489 (1897).
Barrett v. City of New York, 232 U. S. 14 (1913).

CIGARETTE LICENSE, MANUFACTURERS SELLING AT WHOLESALE

(No. 7378—*Department of License—M. H. F.—December 14, 1931—2 pp.*)

Manufacturers of cigarettes who maintain offices in the city, from which cigarettes are sold at wholesale to retail distributors and dealers in the city, come within purview of the city's cigarette license ordinance.

Citations:

Ordinances: Code '31: 3780-93.

Other reference: 2 Bouvier's Law Dictionary (Rawle's 3rd ed.), 2983 "sale."

CIGARETTE LICENSE, SALE IN MORE THAN ONE PLACE

(No. 7878—*Commissioner of Police—W. V. D.—January 4, 1933—3 pp.*)

A license to sell cigarettes can authorize their sale only in one place.

More than one cigarette license is necessary to sell cigarettes in different parts of a hotel when the rooms where they are sold do not

*See also Opinion No. 7473, p. 422, on the sale of cigarettes near schools.

directly connect with each other in such a way as can be considered "one place."

Citations:

Ordinance: Code '31: 3787.

Cases: Malkan v. Chicago, 217 Ill. 471 (1905).
Curry v. City of Aurora, 175 Ill. App. 57 (1913).
Price v. City of Lincoln, 130 Ill. App. 254 (1908).

**CIGARETTE LICENSES FOR EACH PLACE OF SALE—
UNIVERSITY OF CHICAGO**

(No. 6592—*Superintendent, Department of License—R. N. L.—January 26, 1930—5½ pp.*)

The University of Chicago authorities must obtain a license for each place or building in which cigarettes are sold since the university campus is not an enclosed area with but one ingress or egress. It consists of separate and distinct buildings.

Citations:

Ordinance: Code '22: 971 (Cigarette licenses).

Other reference: Op. Corp. Counsel (1923-24), p. 781.

**CIGARETTE LICENSE, SALE ON BOTH SIDES OF ELEVATED
PLATFORMS**

(No. 8131—*City Collector—J. A. S.—July 26, 1933—4 pp.*)

One license for the sale of cigarettes does not cover stands located on two platforms of an elevated station even though they are connected by a bridge, where the license is issued for a particular side of the station involved.

Citations:

Ordinance: Code '31: 3787.

Case: Malkan v. Chicago, 217 Ill. 471 (1905).

Other Reference: Op. Corp. Counsel (1923-24), p. 781.

COAL DEALER

(No. 7488—*Commissioner of Police—Jud. G.—March 10, 1932—2 pp.*)

Every coal dealer is required to obtain a license no matter how large or small be the volume of his business.

Citations:

Ordinances: Code '31: 3345, 3347, 3349-50.

**LICENSE AND FRONTAGE CONSENTS FOR COAL AND
FIREWOOD DEALERS***

(No. 6587—*Secretary Commission on Revenue—L. H.—January 26, 1930—2½ pp.*)

A reasonable license fee for the inspection and regulation of dealers in coal, firewood, etc., would probably be valid.

Citations:

Statute: Cities and Villages act, art. V, sec. 1, cl. 54.

Case: People v. Busse, 240 Ill. 338 (1909).

**COAL DEALER'S LICENSE, PERSON TAKING ORDERS FOR
COAL**

(No. 7496—*Commissioner of Police—Jud. G.—March 15, 1932—1½ pp.*)

A coal dealer's license is not required under any ordinance of the city for any one who merely takes orders for coal.

COSMETIC AND PHYSICAL THERAPEUTIC ESTABLISHMENTS

(No. 6591—*Secretary Commission on Revenue—L. H.—January 24, 1930—2 pp.*)

The passage by the General Assembly of a statute covering the whole subject matter of cosmetic and physical therapeutic establishments deprived the city of its power to license or regulate such establishments.

Citation:

Case: Chicago v. Jensen, 331 Ill. 129 (1928).

**DANCE HALL LICENSE, DANCES GIVEN BY SOCIAL
ORGANIZATIONS**

(No. 8976—*C. N.—December 19, 1935—1½ pp.*)

An organization which maintains regular headquarters is permitted to hold dances for its members at its headquarters without the payment of any license fees. If, however, organization dances are offered in halls not regularly occupied by such organization and the general

*See also Opinion No. 6656, p. 423.

public is permitted to participate upon payment of an admission charge, such affairs must be held in regularly licensed dance halls.

Citations:

Ordinances: Code '31: 1893-1907.

**LICENSE FOR DANCING SCHOOLS*—DANCE HALL LICENSE,
TAXI DANCE HALLS**

*(No. 7290—Commissioner of Police—O. F. W.—November 12, 1931—
1½ pp.)*

Dancing schools do not require licenses.

Where persons operate taxi-dance halls under the subterfuge of dancing schools in order to avoid the payment of a license fee, the police should obtain satisfactory evidence before closing them down, or else injunction suits against the city cannot be successfully defended.

**DAY NURSERY AND FOOD DISPENSER'S LICENSES,
CHARITABLE INSTITUTIONS**

*(No. 8904—Commissioner of Police—C. P. H.—October 25, 1935—
¼ pp.)*

A philanthropic institution operated for poor children must have a day nursery license if children are received for more than four hours at a time.

If a philanthropic institution makes no charge for food and drink served to poor people on its premises, it is not required to obtain a food dispenser's license, although it must comply with all of the provisions of the city's general health ordinance.

Citations:

Ordinances: Code '31: 2331-32, 3013-14.

DENTAL LABORATORIES

(No. 8082—C. N.—May 31, 1933—3 pp.)

Dental laboratories operated as an adjunct of professional attention without remuneration from the ultimate user of laboratories' facilities are not required to pay a license fee.

Dental laboratories operated for profit and catering directly to the public must pay a license fee.

Citations:

Ordinances: Code '31: 2275-83.

*Since this opinion was written, the City Council has passed an ordinance licensing dancing schools. See Coun. J. (1932-33), p. 2146 and Coun. J. (1933-34), p. 1035.

**DISPENSARY LICENSE, PLACE GIVING FREE MEDICAL
ADVICE**

(No. 7431—*President, Board of Health—W. L. S.—January 27, 1932—*
21½ pp.)

Although not advertised as a free dispensary, a place where free medical or surgical service, advice, or treatment is given, and where drugs and remedies are dispensed, is a "dispensary" within the meaning of the city's ordinance and a license must be obtained.

Citation:

Ordinance: Code '31: 2284.

COMPLIANCE WITH LAW ON DISTRESS SALE LICENSES*

(No. 7099—*City Clerk—L. H.—August 29, 1931—3 pp.*)

The law on distress sale licenses creates no requirements with which any city officer other than the City Clerk has to comply.

**DETECTIVE LICENSE, ONE WHO LOCATES DISAPPEARING
PURCHASERS**

(No. 6503—*Superintendent, License Department—M. H. F.—September 11, 1929—5 pp.*)

A person conducting a business of tracing or locating the whereabouts of purchasers of automobiles of certain automobile companies, which persons have broken faith in their payments, is engaging in detective work and must have a license.

Citations:

Ordinances: Code '22: 1029-30.

PRIVATE DETECTIVES AND DETECTIVE AGENCIES

(No. 8253—*Superintendent, Bureau of License Enforcement, Department of License—L. H.—December 22, 1933—3 pp.*)

The statute providing for the licensing of private detectives by the state automatically deprives the city of its power to license detectives and detective agencies, although some of the regulatory features of the city's ordinance on the subject may remain in force.

Citations:

Statutes: SH '33, 24: 65.90.

Ill. Laws (1933), p. 469.

Ordinances: Code '31: 3358-73.

Cases: Chicago v. Union Ice Cream Co., 252 Ill. 311 (1911-12).

Wilkie v. Chicago, 188 Ill. 444 (1900-01).

Chicago v. Jensen, 331 Ill. 129, 131 (1928).

*See Opinion No. 7869, p. 457, on chain store distress sale licenses.

DOG OWNERS AND DEALERS

(No. 7622—C. J. A.—June 25, 1932—2 pp.)

The ordinances require a person who owns a dog to obtain a license for it or be prosecuted, and a person who is engaged in the regular business of selling dogs must have a license or be prosecuted.

Citations:

Ordinances: Code '31: 3167, 3170, 3172, 3955, 3959.

RENEWAL OF PUBLIC VEHICLE DRIVERS' LICENSE AFTER LAPSE

(No. 8535—Public Vehicle License Commissioner—M. H. F.—October 24, 1934—2 pp.)

The Public Vehicle License Commissioner has no authority to renew the license for a driver of a public passenger vehicle if such license has lapsed; in such a case, the driver must apply for a new license.

Citations:

Ordinances: Code '31: 2092-93.

PUBLIC VEHICLE DRIVERS' LICENSE. ISSUANCE TO FELON ON PROBATION*

(No. 8626—Commissioner of Police—M. H. F.—January 14, 1935—2½ pp.)

A driver's license cannot be issued, at the present time, to a person who was convicted of a felony and placed on probation for one year, but after the amendatory ordinance becomes effective, this can be done, as he has not been an inmate of a penitentiary or reform school because of a conviction for a felony.

Citations:

Statutes: SH '33, 24: 76.

Ordinances: Code '31: 2081.

Coun. J. (1934-35), p. 2381, as amended, p. 3240 (Public vehicle license ord.).

*For other opinions on public vehicle licensing see pp. 481, 482.

DRUGS AND DRUG STORES*

(No. 6613—*Secretary, Commission on Revenue—J. L.—March 8, 1930—1½ pp.*)

The city is without power to regulate or license drugs and druggists as they are already directly regulated by the state.

Citation:

Case: *Lowenthal v. Chicago*, 313 Ill. 190 (1925).

Opinions No. 7623 of June 27, 1932, to the Commissioner of Police and No. 8404 of May 23, 1934, to the Chairman, Committee on Finance, both are in accord with the above opinion.

**APPROVAL OF DRY CLEANING ESTABLISHMENT LICENSE
PENDING INJUNCTION**

(No. 8092—*Division Marshal in Charge of Fire Prevention—O. F. W.—June 12, 1933—1 p.*)

The outcome of an injunction suit to restrain the police from interfering with a dry cleaning establishment does not affect the right of the Fire Department to approve or disapprove an application by that establishment for a license.

EXPLOSIVES AND FIREWORKS

(No. 7942—*Commissioner of Police—C. N.—February 11, 1933—2½ pp.*)

The ordinance regulating explosives and fireworks differentiates between a dealer handling a limited amount of cartridges and explosives for rifle and shot gun use and one having in stock large quantities of fireworks at great hazard to the community and different licensing provisions apply to the different uses.

Citations:

Ordinances: Code '31: 3976.

Coun. J. (1932-33), p. 2564 (Amending regulations governing sale of fireworks).

TEAR GAS DEVICES AS EXPLOSIVES

(No. 7827—*Commissioner of Police—C. N.—December 1, 1932—4½ pp.*)

Tear gas devices and sundries do not come within the statutory definitions of bombs, firearms and dangerous weapons.

Tear gas devices and sundries are in the category of explosives

*See also Opinion No. 7447, p. 489, on liquor license for drug store.

and the ordinance concerning explosives applies with equal force to them.

Tear gas bombs come within the general definition of "stink bombs."

Citations:

Statutes: SH '29, 38: 443, 444.

Ordinances: Coun. J. (1932-33), p. 2565 (Explosives ord.).
Code '31: 3973-76.

REGULATION AND LICENSE OF TEAR GAS CARTRIDGES AS EXPLOSIVES*

(No. 8070—C. N.—May 19, 1933—2 pp.)

Tear gas cartridges are classified as explosives, since they are exploded by detonation, and persons desiring to sell them in any quantity whatsoever must apply in writing to the Fire Commissioner before obtaining the required license.

Tear gas bombs come within the general definition of "stink bombs" and are subject to the state laws regulating "stink bombs."

Citations:

Statutes: SH '29, 38: 443.1, 444.2, 445.

Other reference: Opinion No. 7827 (this volume, p. 519).

STORAGE AND DISPLAY OF FIREWORKS AS EXPLOSIVES

(No. 6696—Acting Fire Commissioner—M. H. F.—June 12, 1930—6½ pp.)

The storage and display for the sale of fireworks is permissible under the city's ordinances when the dealer is licensed for that purpose. The city has power by statute to regulate the storage, sale, and use of gunpowder and other explosives.

Citations:

Ordinances: Code '22: 1228-33, 1236-47, 1253-54, 1451-52.

Statute: SH '29, 24: 65 (Cities and Villages act, art. 5, sec. 1).

FOUNDRY MAINTAINED AS PART OF FACTORY

(No. 7539—Superintendent, Department of License—M. H. F.—April 12, 1932—4 pp.)

A foundry which is maintained as a part of a factory for the completion of the products manufactured is required to have a city foundry license.

Citations:

Statute: SH '31, 24: 65.81.

Ordinance: Code '31: 3835.

Case: Harder's Storage Co. v. Chicago, 235 Ill. 58 (1908).

*See also Opinion No. 6620, p. 434, on tear gas guns.

FOOD PURVEYORS AND FOOD DISPENSERS—PRIVATE CAFETERIA*

(No. 8471—City Comptroller—M. H. F.—July 16, 1934—4 pp.)

A cafeteria operated by a private firm solely for the use of its employees and not for the use of the general public is not required to obtain a food dispenser's license.

A "food purveyor" is defined as one who sells food products to the general public when they are not served for consumption upon the premises; a "food dispenser" is defined as one who sells food products to the general public for consumption upon the premises.

Citations:

Ordinances: Code '31: 3008, 3013.

LICENSE FOR SALE OF FOOD FROM PUBLIC PROPERTY—STANDS, VEHICLES, HAND-PACKS

(No. 8105—Chairman, Subcommittee on Health—M. H. F.—June 30, 1933.)

A person selling food at retail from any stand on public property under a permit from the Department of Compensation is subject to the retail food establishment ordinance. If the food sold is for consumption at a stand, the seller comes under the classification of "food dispenser." If the food sold is for consumption away from the stand, the seller comes under the classification of "food purveyor."

A person selling food at retail from an automobile or other vehicle which is parked permanently at a fixed site or which is allowed to stand for a length of time greater than is necessary to complete a peddler's transaction, and a person selling food from a pack at a fixed location under a permit from the Department of Compensation should be considered as conducting businesses from stands or establishments and are therefore subject to the retail food establishments ordinance.

Citations:

Ordinances: Code '31: 2999, 3013.

Other references: Opinion Nos. 6685, 8062 (this volume, pp. 537, 680).

FOOD PURVEYOR'S LICENSE WHEN PRODUCTS NOT CONSUMED ON PREMISES

(No. 7940—A. F. G.—February 10, 1933—2 pp.)

A commissary or grocery store selling near beer and other com-

*Opinion No. 8904, p. 516, deals with food dispensers' licenses for charitable institutions.

modities that are not consumed on the premises must have a food purveyor's license.

A commissary or grocery store located in an apartment house in an apartment district must comply with the zoning ordinance requirements before any food purveyor's license can be issued to the proprietor.

Citations:

Ordinances: Code '31, 3008-09.

Zoning ord., sec. 7.

FOOD PURVEYOR'S LICENSE, SALE OF FRESH MEATS AND FISH

(No. 7971—*Superintendent, Bureau of License—M. H. F.—March 18, 1933—3½ pp.*)

Food purveyors with a class III license who sell fresh meats and fish, even though in cartons or similar containers, should obtain a class II license.

Citation:

Ordinance: Code '31: 3010.

WHOLESALE FOOD ESTABLISHMENT LICENSE, GENERAL SUPPLY DEPOT OF CHAIN STORES

(No. 8526—*Superintendent, Bureau of License—M. H. F.—October 18, 1934—3 pp.*)

A central depot to supply branch or chain stores is a wholesale food establishment subject to license.

Citations:

Ordinances: Code '31: 3144-50.

Case: Chicago v. Arbuckle Bros., 344 Ill. 597 (1931).

WHOLESALE FOOD ESTABLISHMENT LICENSE, PROCESSING AND HANDLING FOOD

(No. 7492—*Superintendent, Department of License—M. H. F.—March 14, 1932—4 pp.*)

Business establishments which are located in the city and which specialize in the processing, handling or packing of various kinds of food are subject to the provisions of the city's wholesale food establishment license, even though the food is neither purchased nor sold by them.

Citations:

Ordinance: Code '31: 3144.

Case: Chicago v. Arbuckle Bros., 344 Ill. 597, 604 (1931).

Wholesale Foods, Chainstore Storehouse: The city's wholesale food establishments ordinance, relating to the preparation, manufacture, canning, bottling, packing, distributing, selling or offering or keeping for sale at

wholesale of food products, is valid as an exercise of its health and safety power.

A company preparing food products and distributing them from its central plant to its chain stores is subject to the wholesale food establishments ordinance.—*Chicago v. Great Atlantic and Pacific Tea Co.*, 282 Ill. App. 337 (1935).

FURNITURE MOVERS AND THEIR SOLICITORS

(No. 7830—*Secretary, Commission on Revenue, Committee on Finance*—*M. F. M.*—December 6, 1932—1½ pp.)

The city has been given the power to license furniture movers but not solicitors of business for furniture movers.

Citations:

Statutes: Cah. '31, 24: 65(42).

FUMIGATION FOR INSECT EXTERMINATION

(No. 6629—*Commissioner of Health—C. J. A.*—March 28, 1930—3½ pp.)

The sections of the City Code which provide for the licensing and regulation of the business of insect extermination by fumigation make it the duty of the Board of Examiners appointed under the sections (1) to examine the applicant for a license, if he is an individual; (2) if the applicant is a firm or corporation, to require that the applications specify the names of the responsible officers or agents officially designated by the firm or corporation to supervise and control its fumigating work; (3) to examine any other persons engaged by the licensee to work as fumigators.

A corporation which exterminates by fumigation is required to obtain only one license, but each of its supervising agents and all of its employees engaged in the actual work of fumigation must be examined by the Board of Examiners.

Citation:

Ordinance: Coun. J. (1929-30), p. 788 (Licensing and regulation of the business of insect extermination by process of fumigation).

OUT-OF-TOWN FUMIGATION COMPANY

(No. 6602—*M. H. F.*—February 14, 1930—2 pp.)

An out-of-town fumigation company doing work within the city must obtain a license unless its work is confined exclusively to fumigation of greenhouses, grain elevators, and cereal or tobacco warehouses.

Citation:

Ordinance: Coun. J. (1929-30), p. 788.

REGULATION OF OUT-OF-TOWN FUMIGATION LICENSEES

(No. 6605—*M. H. F.*—February 19, 1930—2 pp.)

An out-of-town fumigation licensee must furnish a bond in accordance with the ordinance. The filing of a certified copy of a liability insurance policy with the City Collector does not satisfy the requirements of a bond.

An out-of-town fumigation licensee must file with the City Collector a letter from the State Industrial Commission showing that the licensee has conformed with the Illinois Workmen's Compensation act.

Citations:

Ordinance: Code '22: 2141(d) (Fumigation).

Other reference: Opinion No. 6602 (this volume, p. 523).

GASOLINE FILLING STATION LICENSE, GASOLINE SOLD EXCLUSIVELY TO EMPLOYEES*

(No. 7069—*Superintendent, Department of License—M. H. F.*—August 12, 1931—3½ pp.)

Industrial plants maintaining a parking station for their employees and selling gas thereon exclusively to the employees, even though their operation may be solely for the purpose of accommodation and not for profit, are engaged in the conduct of the business of a filling station and subject to the filling station license ordinance.

Citations:

Ordinances: Code '31: 3273, 3275.

Cases: Cuzner v. California Club, 155 Cal. 303, 100 Pac. 868 (1909).
Easterbrook v. Hebrew Ladies Orphan Society, 85 Conn. 289, 82 Atl. 561 (1912).
Thibaut v. Kearney, 47 La. Ann. 149, 12 So. 39 (1893).
Craig v. Patterson, 74 Miss. 881, 21 So. 756 (1897).
State v. Shotts, 143 Mo. App. 346, 128 S. W. 245 (1910).
The Germania v. State, 7 Md. 1 (1854).

FILLING STATION LICENSE AND STREET COMPENSATION FOR CURB GASOLINE PUMPS

(No. 7702—*Superintendent, Bureau of License—M. H. F.*—August 8, 1932—5 pp.)

The city may require owners of curb pumps selling gasoline to the public to obtain gasoline filling station licenses under the automobile

*Opinions No. 7806 and 8675, p. 462, deal with license fees for gasoline filling stations.

filling station license ordinance and also to pay compensation for the use of city streets under the curb pump compensation ordinance.

Citations:

Ordinances: Code '31: 3238, 3273.

Coun. J. (1931-32), p. 1253 (Curb pump ord., Nov. 18, 1931).

Curb Pump License: The Supreme Court invalidated the curb pump ordinance on the ground that the maintenance of such pumps constituted a use of public streets for private gain.—*People v. Wolper*, 350 Ill. 461 (1932).

OPEN-AIR GARAGES WITH FILLING STATIONS

(No. 7409—*Superintendent, Department of License—M. H. F.—January 8, 1932—6½ pp.*)

Open-air garages which operate filling stations must obtain a filling station license.

Open-air garages operating filling stations which were established prior to the amendment of July 11, 1928, to the City Code, are not required to obtain frontage consents in order to continue the filling stations.

Citations:

Ordinances: Code '22: 246, 249 (as amended March 25, 1925 and July 11, 1928), 291, 2279.

Code '31: 2760, 3235, 3238, 3274.

Other references: 37 CJ 168.

15 Op. Corp. Counsel 118.

GASOLINE FILLING STATION TANKS

(No. 7853—*Secretary, Commissioner on Revenue—M. H. F.—December 23, 1932—4 pp.*)

A higher license fee is provided for filling station containers which are used as tanks to dispense gasoline directly to automobile users than for such containers as are used exclusively for the preliminary holding or storage of liquids.

When two or more tanks that are located on the same retail sales filling station are connected by pipes, siphons, hose, or the like, and attached to dispensing equipment, all should be considered as parts of one dispensing equipment of the station and each is subject to the higher license fee.

Citations:

Ordinances: Code '31: 3225, 3273-84.

LICENSING ADDITIONAL BUSINESSES CARRIED ON BY FILLING STATIONS

(No. 6854—*Secretary, Commission on Revenue—M. H. F.—March 28, 1931—3½ pp.*)

The power of the city to exact an additional license fee for the polishing, washing, greasing, painting or refinishing of cars when the business is carried on by a licensed gasoline filling station is very doubtful.

The city may require a licensed gasoline filling station, carrying on the additional business of operating an automobile repair shop proper or engaging in machine shop repairing, to pay an additional license fee for this privilege.

Citations:

Statutes: SH '29, 24: 65.64, 65.81.

Ordinance: Code '22: 268.

PUBLIC GARAGES*

(No. 6697—*M. H. F.—June 13, 1930—2½ pp.*)

The city's public garage ordinance is valid, and any attempt to run a garage business without a license will result in prosecution. No refund can be made of the garage license fee even though the city has not kept the streets clear of night parking.

PUBLIC GARAGE LICENSE, SCOPE OF ORDINANCE

(No. 8054—*Superintendent, Bureau of License—C. N.—May 13, 1933—2 pp.*)

The term "public garage" in the city's ordinances means any premises, including lots and parcels of land, but excepting public thoroughfares where two or more automobiles are parked, stored or housed, and compensation is collected for so parking, storing or housing the automobiles.

The fact that a piece of property used for garage purposes does not face upon a Chicago street does not remove the garage from the jurisdiction of the city's licensing powers.

Citations:

Ordinances: Code '31: 3231-32, 3235.

*See also Opinion No. 7641, p. 430.

OPEN-AIR GARAGES—FREE PARKING TO RESTRICTED GROUPS

(No. 8128—*Superintendent, Bureau of License—J. F. G.—July 25, 1933—2½ pp.*)

If no direct charge is made for the privilege of parking an automobile in an open-air garage and this privilege is accorded to customers of a department store regardless of whether purchases are made, the garage is not subject to license.

However, if the privilege of parking in an open-air garage is extended only to guests of a hotel or patrons of an amusement place where a charge is made for the hotel or amusement accommodations and the garage privileges are included, the garage is subject to the licensing ordinance.

Citations:

Ordinances: Code '31: 3231-33.

COMPUTATION OF PUBLIC GARAGE LICENSE FEES

(No. 8806—*Superintendent, Bureau of License—M. H. F.—June 26, 1935—3½ pp.*)

Public garage license fees are computed on the basis of the gross interior floor area, including space for aisles, but excluding elevator shafts, ramps, and space enclosed by partitions which is actually used for offices, toilet and wash rooms, and public waiting rooms.

The city has ample authority under the Cities and Villages act to regulate and license the business of public garages.

Citations:

Ordinance: Code '31: 3236, as amended Mar. 15, 1933.

Cases: *People v. Village of Oak Park*, 266 Ill. 365 (1915).

Crerar Clinch Coal Co. v. Chicago, 341 Ill. 471 (1931).

Opinion No. 8244 of December 15, 1933, to the Chairman of the Committee on Finance is in accord with the above opinion.

HOSPITAL LICENSE, FIRST-AID HOSPITALS*

(No. 7866—*President, Board of Health—A. F. G.—December 28, 1932—4½ pp.*)

An institution that is advertised as a "first aid hospital," where patients are not kept over night, where only casualty cases are handled, and where there is only one bed for temporary use of a pa-

*See also opinions, p. 585, on frontage consents for hospitals.

tient, is nevertheless a "hospital" within the meaning of the city ordinance requiring hospitals to have a license.

Citations:

Ordinances: Code '11: 1213 (as amended Coun. J., 1916-17, vol. II, p. 3767).
Code '31: 2293-94.

FEE EXEMPTION OF HOSPITALS, DURAND HOSPITAL

(No. 7395—*Commissioner of Public Works—C. J. A.—December 22, 1931—3½ pp.*)

The Durand Hospital by specific mention in the City Code is exempt from the payment of an annual license fee, and, as a charitable institution, from the payment of fees for inspections by the Department of Health and the Department of Smoke Inspection and Abatement and the payment of the Department of Buildings annual inspection fee.

Hospitals are not exempt from the fees prescribed for permits for the construction, alteration, or repair of buildings.

Citations:

Ordinances: Code '31: 546(h) as amended, Oct. 21, 1931, 1199(h), 2300, 2422.

ITINERANT ICE VENDORS

(No. 6840—*Secretary, Commission on Revenue—M. H. F.—February 27, 1931—1½ pp.*)

The City Code requires itinerant vendors of ice to have a license.

Citation:

Ordinance: Code '22: 1968, as amended June 4, 1924 and Mar. 30, 1929.

ICE CREAM PARLOR LICENSE, FEE FOR RESTAURANTS

(No. 6428—*Superintendent, Department of License—L. H.—May 6, 1929—3 pp.*)

When a person or company maintains that he or it is conducting a restaurant business and that the sale of ice cream and fountain drinks is only a small part of, or incidental to the restaurant business, the Department of License should make some reasonable compromise as to the proportion of the total seating capacity on which the fee for the ice cream parlor license is to be based, so that the city will obtain a proper license fee until the courts have clarified the restaurant license situation.

Citation:

Case: *Chicago v. Hagley*, 249 Ill. App. 647 (1928).

ICE CREAM FACTORY, VEHICLES OPERATED BEYOND CITY

(No. 8096—President, Board of Health—M. H. F.—June 22, 1933—
3 pp.)

In licensing ice cream factories, all vehicles operated by a factory should be taken into consideration, even though some of the vehicles may be used only to deliver ice cream to points beyond the city limits.

Citations:

Ordinances: Code '31: 3076-77.

**SECOND-HAND AND JUNK DEALER'S LICENSE
ENFORCEMENT***

(No. 7471—Commissioner of Police—M. H. F.—March 1, 1932—1½
pp.)

There is nothing to prevent the Commissioner of Police from enforcing the sections of the City Code pertaining to the licensing and regulation of second-hand dealers and junk dealers.

Citations:

Ordinances: Code '31: 3684-87, 3689-95.

Coun. J. (1931-32), p. 1360.

Case: Beskin v. Chicago, 341 Ill. 489 (1931).

Junk Stores and Yards: Sections 3511-12 of the Code of 1922, which regulate junk stores and yards, classifying wholesale and retail junk dealers, are neither unreasonable, oppressive, discriminating nor confiscatory. A dealer in one class can complain only of the provisions of the ordinance which apply to the business conducted by him.—Beskin v. Chicago, 341 Ill. 489 (1931).

Junk Dealers: Sections 3511-12 of the City Code of 1922 regulating and licensing junk stores and yards are void to the extent that they require a license for the business of buying rags and paper from dealers in large quantities, sorting and grading them according to quality, and selling them to mills and factories, usually in carload lots.—Chicago v. Northern Paper Stock Co., 337 Ill. 194 (1929).

Junk Dealers: The City Council has power to license, regulate, and direct the location of all places of business of purchasers, traders and dealers in junk, rags and any second-hand article whatsoever.—Ill. Laws (1935), p. 547.

JUNK DEALER'S LICENSE, PREMISES ON STREET CAR LINE

(No. 8373—City Comptroller—M. H. F.—April 25, 1934—5½ pp.)

The junk dealers' licensing ordinance is valid.

No license should be issued to a junk dealer whose premises are located on a street car line and his establishment should not be allowed to open unless he can show that his business was established at that

*See also Opinion No. 7618, p. 443.

place on the street car line prior to the passage of the zoning ordinance and has been continuously operated as such since then.

No license for the current year may be issued to any person indebted to the city for license fees of prior years.

The city should prevent the conduct of a business subject to license until such time as a license is formally paid for and issued.

Citations:

Ordinance: Code '31: 2915.

Cases: Chicago v. Adelman, 326 Ill. 58 (1928).

Beskin v. Chicago, 341 Ill. 489 (1931).

Opinion No. 8358 of April 4, 1934, to the Deputy acting for the Mayor, Department of Buildings, is in accord with the above opinion.

LAUNDRY SERVICE, LINEN SUPPLY CONCERNS*

(No. 6834—*Secretary, Commission on Revenue—M. H. F.—February 11, 1931—2½ pp.*)

Linen supply concerns operating laundries which do not do business for the general public are not subject to the city's laundries ordinance.

Citations:

Ordinance: Code '22: 2375.

Case: Ruban v. Chicago, 330 Ill. 97 (1928).

COMMISSIONER OF HEALTH'S POWER OVER LAUNDRIES— LAUNDRY LICENSE TO HOTEL

(No. 7792—*City Collector—M. F. M.—October 25, 1932—2½ pp.*)

The Commissioner of Health has power to supervise laundries to the extent of determining whether the ordinances of the city and state laws are being followed.

Issuance of a laundry license to a hotel doing work for the guests therein is within the jurisdiction of the Commissioner of Health.

"Tenant house" as used in the laundry license ordinance includes an apartment hotel.

Citations:

Ordinances: Code '31: 3534-35.

Other reference: Opinion No. 7198 (this volume, p. 456).

*Opinion No. 7198, p. 456, also deals with laundry licensing.

REVOCATION OF LAUNDRY LICENSE, PREMISES BECOMING TENEMENT

(No. 6789—*Commissioner of Health—M. H. F.—October 16, 1930—3 pp.*)

The ordinance regulating the location of new laundries in tenement houses is not retroactive and a license for an existing laundry should not be revoked during the current license period, even though the building that houses the laundry has, in the meantime, become a tenement.

Citation:

Ordinance: Code '22: 2393.

LAUNDRY LICENSE, HAND LAUNDRIES IN TENEMENTS

(No. 7377—*Commissioner of Health—W. L. S.—December 14, 1931—3 pp.*)

The Commissioner of Health cannot be required nor is it his duty to renew licenses for hand laundries in tenement houses for the year of 1932, since these licenses were originally issued on Council orders which were in violation of the terms of the laundry ordinance.

A Council order cannot repeal, contravene or amend an ordinance.

Citations:

Ordinance: Code '31: 3534.

Other reference: Opinion No. 7198 (this volume, p. 456).

LOCKSMITHS AND KEYSMITHS

(No. 7350—*Alderman, 10th Ward—M. H. F.—December 8, 1931—3 pp.*)

The city has not been given the express authority to license locksmiths and keysmiths, hence the more drastic is a proposed ordinance in this regard, the more likely it will be successfully attacked in the courts.

Citations:

Cases: *City of Rockford v. Nolan*, 316 Ill. 60 (1925).
Consumers Co. v. Chicago, 313 Ill. 408 (1925).
Arms v. Chicago, 314 Ill. 316 (1925).
Moy v. Chicago, 309 Ill. 242 (1924).

Lumber Storehouses: The city is authorized to license and regulate lumber storehouses.—Ill. Laws (1935), p. 354.

MACHINE SHOP LICENSE, SHOP CONNECTED WITH FACTORY

(No. 7542—*Superintendent, Department of License—M. H. F.—April 14, 1932—2 pp.*)

The operators of machine shops which are conducted in connection with manufacturing establishments are required to have a city machine shop license.

Citations:

Ordinance: Code '31: 3834(a).

Other reference: Opinion No. 7539 (this volume, p. 520).

MACHINE SHOP LICENSE FOR SHOPS OF RAILROADS

(No. 8343—*M. H. F.—March 27, 1934—7 pp.*)

The city has the power to license a machine shop of a railroad even though it be a private shop and not one serving the general public and even though the railroad company be involved in interstate commerce, as this is a legitimate exercise of the police power imposed to protect municipal citizenry.

Citations:

Cases: *Chicago v. Chicago and Alton Railroad*, 355 Ill. 65 (1934).

Crerar Clinch Coal Co. v. Chicago, 341 Ill. 471 (1931).

OPINION OF FOREGOING SYNOPSIS

We have considered your letter of recent date relating to the question whether the machine shop at 93rd street and Blackstone avenue, operated by your client, the Nickel Plate Railroad, is subject to the city's machine shop license ordinance.

It is noted that you are not disposed to accept as conclusive the recent decision of the Supreme Court of Illinois in the case of *City of Chicago v. The Alton Railroad Company*, 355 Ill. 65, but are now advancing additional reasons why this railroad should not comply with the ordinance by taking out a license under it. * * *

The additional points now urged by you are two in number: (1) That the machine shop in question is a private and not a public machine shop, that is, according to your statement the Nickel Plate uses it only for its own purposes and does not do work for the general public; (2) That the city has no power to require a license for carrying on any phase of interstate commerce.

The first of these two points has been raised before at the instance of a large number of defendants (the Pullman Company among them) in quasi-criminal prosecutions begun by the city for failure on the part of the defendants to comply with the licensing provisions of the machine shop ordinance. Many of the defendants in these cases were members of the Illinois Manufacturers' Association and were represented by attorneys for that organization, who vigorously urged upon the court the fact that their clients were not engaged in the machine shop business generally, that they did not solicit or do machine shop work for the public, but only as an incidental part of their main manufacturing business. Counsel used the case of *Crerar Clinch Coal Company v. City of Chicago*, 341 Ill. 471, in the same manner that you are now using it, in their attempt to get the court to hold that the city's power

was limited to the business of operating machine shops and that under the facts shown of record their clients were not engaged in that business. The Municipal Court, however, decided against them and in favor of the city, holding that they were subject to this ordinance. The defendants prayed and were allowed an appeal but later abandoned the appeal and complied with the ordinance by taking out licenses, whereupon the adjudications became final. Furthermore, before these cases were decided, counsel for both the plaintiff and the defendants filed briefs which went exhaustively into the subject and reviewed numerous court authorities. With these adjudications standing in favor of the municipality we cannot agree with this point raised by you.

Your second point is that the machine shop of the Nickel Plate is used for the maintenance and repair of railroad coaches, cars and locomotives, that all such cars and locomotives on which work is done are used in interstate commerce, that the machine shop work done upon them is a part of interstate commerce, and that the city has no power to require a license for carrying on any phase of interstate commerce.

In this stated legal conclusion that the city has no power to license the machine shop of your client we cannot agree. It is, in our opinion, at variance with the settled law upon the subject. Frequently the courts have held that reasonable municipal regulations to protect public safety and health may be imposed on interstate commerce. City ordinances requiring railroad and express companies doing business in a city and also an interstate business to take out licenses and pay license fees have been held valid by the Supreme Court of the United States. The ordinance which your client resists is a salutary measure passed under express authority from the legislature and sustainable under the city's general police power. Its incidental effect upon or interference with interstate commerce is not believed to be objectionable. The ordinance tends to protect the lives, health, property and welfare of not only the railroad's employees but the public. It contains sanitary requirements to protect employes and the public, provisions as to safety of premises and reduction of fire hazards, prohibits use of locations within two hundred feet of a school, hospital or church, and prohibits night time operation in an exclusively residential block. It is common knowledge that machine shops make considerable noise in operating their heavy presses, drills, and lathes, and if permitted to be located and run at all hours in residential neighborhoods, without regulations, would injuriously disturb the peace and quiet thereof, decrease real estate values and become serious nuisances. It may readily be seen how detrimental to the public welfare would be unregulated operation. When exercised for the protection of the lives and health of the public the police power of a state extends beyond the commercial power of Congress and may be exercised to abate nuisances and to prohibit the operation of manufacturies deemed injurious to the public health. We believe it to be well settled that a state or a municipality of a state may make valid enactments in the exercise of legislative power to promote the welfare and convenience of citizens, although in their operation they may have an effect on interstate traffic. The fact that railroad cars and locomotives are employed as vehicles of transportation for the interchange of interstate commerce does not render their taxation by the state invalid, and we do not believe that the exacting of a license fee under a municipal ordinance for the operation of a machine shop where such cars and locomotives are repaired would be held to be in violation of the commerce clause of the United States Constitution.

The mere fact that interstate commerce is indirectly affected will not prevent the municipality from exercising its police power. The Supreme Court of the United States has repeatedly held that a state may require payment of an occupation tax from one engaged in both intrastate and interstate commerce and such power may be delegated to a municipality.

Furthermore, the business of operating this machine shop which is regu-

lated and licensed by the ordinance being considered, even though cars used in interstate commerce are repaired in it, appears to us to be wholly intrastate. The ordinance does not place a direct and material burden upon interstate commerce. It does not exact a license fee for the operation of the railroad cars and locomotives but only on the local machine shop establishment. This establishment is essentially local in character. It is not believed that the railroad could show that the ordinance directly interferes with or materially burdens its interstate business. The burden to show this would, of course, be upon the railroad.

Undoubtedly, the exertion of power essential to assume needed protection to the city and its inhabitants may extend incidentally to the operations of a railroad in its interstate business, provided that it does not subject the business to unreasonable demands.

Again, the power to regulate includes the power to license and exact a reasonable fee to defray the cost of regulation. The ordinance involved is one for regulation. There is no difference in theory between this ordinance, which directs the location and regulates the use of machine shops and the city's smoke abatement ordinance which prohibits the locomotives used by the Nickel Plate road in interstate commerce from emitting dense smoke and requires them to be equipped with smoke consuming devices and to pay fees to the city to defray the cost of regulation. The city's smoke abatement ordinance has been upheld against the attack that it imposed restraint upon interstate commerce and conflicted with the power of Congress given under the commerce clause of the Constitution.

We have examined the authorities cited by you in your letter on this point of infringing the commerce clause but find that they do not disturb our conclusions herein stated.

* * * * *

Markets: Open-air markets operated on private property are subject to license and regulation by the city.—Coun. J. (1932-33), p. 2916.

OPEN-AIR MARKET LICENSE, LESSEES OF MARKET

(No. 8142—*Superintendent, Bureau of License Enforcement*—J. A. S.—August 14, 1933—4½ pp.)

Where a license is issued to one person for an open-air market at a certain location, lessees of the space at such location need not take out individual open-air market licenses.

Citations:

Ordinances: Code '31: 816-840, 3008-12.

Case: Caldwell v. City of Alton, 33 Ill. 416 (1863-64).

MASON CONTRACTOR'S LICENSE, RENEWALS WITHOUT EXAMINATION*

(No. 8163—*Board of Examiners of Mason Contractors*—L. H.—September 1, 1933—3½ pp.)

The Board of Examiners of Mason Contractors may in its discretion issue license renewals, without re-examination, to masons who failed to renew their license annually, upon payment of the license fees for

*See also Opinion No. 8419, p. 463.

the intervening years and the payment of the renewal fee for the current year.

Citation:

Ordinance: Code '31: 3816.

MASSAGE PARLORS*

(No. 7898—*Mayor—C. N.—January 13, 1933—2½ pp.*)

The city has the implied right to license and regulate massage parlors under its police powers of health regulation.

Citations:

Cases: Knoxville Iron Co. v. Harbinson, 183 U. S. 13 (1901).
Chicago v. Dragosawcz, 256 Ill. 99 (1912-13).
Ex parte Lucas, 160 Mo. 218 (1901).
Metropolis Theater Co. v. Chicago, 246 Ill. 24 (1910).
Van Hook v. City of Selma, 70 Ala. 361 (1881).
Morgan v. City of Orange, 50 N. J. L. 389 (1888).

Other references: McQuillin, Mun. Corp., secs. 1086, 2315.

LICENSING OF MASSAGE PARLORS*

(No. 7918—*President of the Board of Health—M. H. F.—January 28, 1933—3½ pp.*)

The state act concerning beauty culture excludes persons giving therapeutic massage for the treatment of muscular or nervous disorders and thus the city probably possesses authority to license massage parlors.

Citations:

Statute: SH '31, 16¾: 16.
Ordinances: Code '31: 3294-3302.
Case: Chicago v. Jensen, 331 Ill. 129 (1928).

MASSAGE PARLOR LICENSE FOR LICENSED CHIROPRACTOR

(No. 8663—*M. H. F.—February 5, 1935—1½ pp.*)

The fact that a chiropractor who wishes to install a so-called massage department is licensed under the State Medical act does not relieve him of the necessity of procuring a state license or of complying with the city's massage parlor ordinances.

Citations:

Ordinances: Code '31, 67: 3294-3302, amended, Coun. J. (1933-34), p. 1565.

*See Opinion No. 8662, p. 437, on regulation of massage parlors.

MILK VEHICLE LICENSE, SHAREHOLDERS OF COOPERATIVE MILK COMPANY

(No. 8737—*President, Board of Health*—W. V. D.—April 8, 1935—1 p.)

Shareholders of a cooperative milk company who do not transact business in the name of the company and who are not licensed in the name of the company are subject to an annual license fee for each wagon or motor vehicle they operate in the city.

MOTION PICTURE OPERATOR'S LICENSE, APPRENTICESHIP REQUIREMENTS

(No. 7158—*Commissioner of Gas and Electricity*—C. J. A.—September 29, 1931—2 pp.)

An applicant for a license as a motion picture machine operator does not have to serve his apprenticeship in Chicago.

Citation:

Ordinance: Code '31: 3541.

MOTION PICTURE OPERATOR'S LICENSE, REFUND FOR EXAMINATION FAILURE

(No. 7252—*Commissioner, Department of Gas and Electricity*—S. A. M.—November 4, 1931—1½ pp.)

An applicant for a moving picture operator's license who fails to pass the necessary examination has no right to a refund of the fee that he has paid, even though he does not wish to take subsequent examinations.

Citation:

Ordinance: Code '31: 3542.

MOTION PICTURE OPERATOR'S LICENSE, EXAMINATION AND PROOF OF EXPERIENCE

(No. 7083—*Commissioner of Gas and Electricity*—L. H.—August 21, 1931—2½ pp.)

It is within the discretion of the Commissioner of Gas and Electricity to determine whether the proof offered of prior experience on the part of an applicant for a license as a moving picture operator is sufficient; a properly authenticated union card and a sworn affidavit of the applicant would be sufficient proof to warrant giving such applicant an examination.

The Commissioner of Gas and Electricity has the power to make the examination of applicants for a moving picture operator's license more difficult.

Citation:

Ordinance: Code '31: 3541.

MOTION PICTURE OPERATOR'S LICENSE, EXPERIENCE REQUIREMENTS

(No. 7094—Commissioner of Gas and Electricity—L. H.—August 27, 1931—1 p.)

The affidavit that an applicant for a license as a moving picture operator has actually operated a moving picture machine in the city for more than one year is acceptable proof thereof, and entitles such applicant to take an examination for said license.

PEDDLER'S LICENSE, NON-RESIDENTS SELLING WITHIN CITY*

(No. 8498—R. N.—September 4, 1934—1 p.)

The provisions of the ordinances regulating and licensing peddlers apply alike to both residents and non-residents selling merchandise within the city limits.

PEDDLER'S LICENSE, SELLING AND DELIVERING MERCHANDISE FROM TRUCKS*

(No. 8473—Alderman, 10th Ward—M. D. S.—July 17, 1934—1½ pp.)

Any person, firm or corporation who sells and delivers merchandise from trucks going from place to place upon the city streets must obtain a peddler's license.

Citation:

Ordinance: Code '31: 3573.

PROPER USE OF PEDDLER'S LICENSE—PARKING BY PEDDLER'S VEHICLES*

(No. 6685—Commissioner of Police—M. H. F.—May 29, 1930—3pp.)

A peddler's license to sell on the streets of the city is being properly used when the product sold is wholesome, manufactured in a licensed factory and handled in a sanitary manner satisfactory to the Department of Health.

A peddler's vehicle has no right to park on a public thoroughfare

*See also Opinion No. 8712, p. 461, on the enforcement of the peddler's license ordinance.

without a special permit issued by the Department of Compensation in accordance with the city's ordinances.

PEDDLER'S LICENSE, STANDS ON STREETS*

(No. 6981—Alderman, 39th Ward—F. J. B.—July 2, 1931—3½ pp.)

Persons engaged in selling flowers, food, and the like, in stands on public streets authorized by the Commissioner of Compensation do not come within the term "peddlers" and are not subject to the ordinances relating to peddlers. A business conducted on a stand on public streets is subject to license and to the regulations prescribed by other ordinances pertinent to that particular kind of business.

Citations:

Ordinances: Code '22: 2013, 2591, 2924, 2926, 3258(B), 3258(C), 3735 (as amended Jan. 9, 1928).

PEDDLER'S LICENSE, SALE OF GOODS BY MICHIGAN TRUCK OWNER*

(No. 7154—C. J. A.—September 29, 1931—3 pp.)

If the selling of his products would require a Michigan truck owner to "travel from place to place, on, along or upon the streets of the city," he would come within the definition of a "peddler" and would therefore require a peddler's license whether his customers were retail dealers or other purchasers, but if he sold his produce from a market wagon or truck at one of the market places established by the city, he would be required to pay the fees fixed for that purpose.

If the orders were taken and filled in such a manner that the transaction would constitute interstate commerce, as where the goods were brought from another state on order, the peddler's ordinance would not apply.

Citation:

Ordinance: Code '31: 3575.

PEDDLER'S LICENSE, DAIRY PRODUCE SALES BY FARMER*

(No. 8024—M. H. F.—April 21, 1933—2½ pp.)

An Illinois farmer desiring to go from house to house in the city, selling eggs, butter and cream produced on his own farm, must take out a city peddler's license and comply with the provisions of the City Code which relates to milk dealers.

An Illinois farmer, selling within the city products of his own farm,

*See also Opinion No. 7031, p. 676, and the annotation "Regulating Selling on Streets", p. 674.

is exempt from paying a city license fee only when he sells those products in established markets.

Citations:

Statute: SH '31, 5: 9.

Ordinances: Code '31: 3082-3113, 3573-86.

**PEDDLER'S LICENSE, SALE OF BOOKLETS ON STREETS OR
FROM NEWS STANDS**

(No. 7401—*Commissioner of Police—L. H.—December 30, 1931—2½ pp.*)

Persons selling booklets on the public streets would have to have a peddler's license. The sale of books from newspaper stands erected on the public streets is prohibited by ordinance.

Citations:

Ordinances: Code '31: 3573-86.

PLUMBER'S LICENSE, APPLICATIONS PRIOR TO JULY 1, 1935

(No. 8888—*Board of Plumbing Examiners—A. F. G.—September 27, 1935—2½ pp.*)

Persons who filed applications for plumbers' licenses prior to July 1, 1935, and who have not been examined, should file a new application in accordance with the ordinance of August 2, 1935, and pay an application fee of four dollars.

Citations:

Statutes: Cah. '33, 109(a): 1-9.

ISBS '35, 109(a): 9.

Ordinances: Coun. J. (1935-36), p. 581 (Board of Plumbing Examiners ord.).

PLUMBER'S LICENSE, EXAMINATION FEE

(No. 6920—*Board of Examiners of Plumbers—C. J. A.—May 29, 1931 2 pp.*)

While no power to charge a fee to cover the expense of the plumber's examination is expressly given the city by statute, the courts probably would hold such a fee valid.

Citation:

Statute: SH '29, 24: 678.

SHOPS AND EMPLOYEES OF LICENSED MASTER PLUMBERS

(No. 8796—*Board of Examiners of Plumbers*—M. H. F.—June 17, 1935—5 pp.)

A licensed master plumber may maintain more than one plumbing shop and may employ in his shops persons who are not licensed plumbers or journeymen so long as those persons do not do any plumbing work.

Citations:

Statutes: SH '33, 24: 675-683.

Ordinances: Code '31: 559-561, 3593-97.

Case: Wright v. Baird, 249 Ill. App. 90 (1928).

JOURNEYMEN AND MASTER PLUMBERS, AUTHORITY TO CONTRACT

(No. 7722—*President, Board of Health*—B. J. K.—August 19, 1932—2½ pp.)

A journeyman plumber having a certificate of competency may contract with property owners for plumbing work to be done by him personally, but he may not contract for work where it will become necessary for him to employ others to assist in or complete any specific contract.

Any person having a certificate of competency as a master plumber or employing plumber has authority to contract for plumbing and employ other plumbers to do the work for which they have contracted.

Citations:

Ordinances: Code '31: 559, 561, 3593.

UNSUPERVISED PLUMBING WORK BY JOURNEYMEN PLUMBERS

(No. 6636—*Board of Examiners of Plumbers*—F. J. V.—April 10, 1930—6½ pp.)

It is not a violation either of state law nor of the city ordinance for a licensed journeyman plumber who is not employed by a licensed master plumber to install plumbing unsupervised by a licensed master plumber.

The state act for licensing plumbers does not, and the city's ordinance on plumbers and plumbing could not, subject the constitutional right and liberty of one class of plumbers to work at their chosen trade

to the will of any other class of plumbers or to any other institution than the state itself in the lawful exercise of its police powers.

Citations:

Ordinances: Code '22: 2938-39.

Statutes: Cah. '29, 109(a): 1, 2, 5.

Cases: Douglas v. People, 225 Ill. 536 (1907).

State v. New Orleans, 36 So. 999, 67 L. R. A. 170 (La. 1904).

Matthews v. People, 202 Ill. 389 (1903).

Massie v. Cessna, 239 Ill. 352 (1909).

Gray v. Building Trades Council, 97 N. W. 663, 63 L. R. A. 753 (Minn., 1903).

Allgeyer v. Louisiana, 165 U. S. 578, 17 S. Ct. 427 (1897).

Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18 (1883).

Other references: Black, Const. Law, pp. 437, 438, 574.

PUBLIC CARTS

(No. 8130—*Superintendent, Bureau of License*—J. F. G.—July 26, 1933—4 pp.)

Provisions in the 1931 Code relating to the license fees of public carts are unenforceable as the license provisions relating thereto had been previously repealed and not reenacted. Since the Code of 1931 was a compilation or codification of existing ordinances, the parts of ordinances therein which the City Council had repealed are unenforceable.

Citations:

Ordinances: Code '22: 3984-98.

Code '31: 2143-57.

Coun. J. (1930-31), p. 2930.

Case: Fish v. Walsh, 323 Ill. 359 (1927).

Opinion No. 6575 of December 30, 1929, to the Superintendent of License deals with the application of the public carts licensing ordinance.

RESTAURANTS, LICENSING OF

(No. 7402—*C. J. A.*—December 30, 1931—4½ pp.)

Under the Potson case, the city has been held to be without power to license the occupation of restaurant keepers.*

The Mayor may not undertake, under the guise of enforcing a city health ordinance, to administer state laws governing private civil rights for the enforcement of which the legislature has provided other and specific remedies.

Citations:

Statutes: SH '29, 38: 125-128.

SH '31, 24: 65.90.

Cases: Potson v. Chicago, 304 Ill. 222 (1923).

White v. Pasfield, 212 Ill. App. 73 (1919).

*Potson v. Chicago, 304 Ill. 222 (1923) held that under the power to license ordinaries, the city could not license restaurants. Today, the city regulates restaurants, among other establishments, under its retail food es-

LAMB SLAUGHTERING ESTABLISHMENT

(No. 7585—*President, Board of Health*—W. L. S.—May 24, 1932—3½ pp.)

Lamb slaughtering establishments, where slaughtering is carried on intermittently from one to possibly four days a week, must obtain a license. A daily permit will not suffice.

Citations:

Ordinances: Code '31: 3116, 3118.

ERECTION OR REPAIR OF STEAM BOILERS

(No. 6467—*E. M. K.*—July 11, 1929, 3 pp.)

One who would "service" the steam boilers of his plant must obtain a license for erecting and repairing steam boilers.

Citations:

Ordinances: Code '22: 3659, as amended.
Coun. J., July 11, 1928, p. 3353.

STEAM BOILER LICENSE, PERSON NOT REGULARLY IN REPAIR BUSINESS

(No. 6407—*Chief Inspector, Department of Steam Boilers*—F. J. V.—April 17, 1929—5½ pp.)

Any person who is properly qualified, regardless of whether he is employed by a corporation, has a constitutional right to apply for, and to receive a license under the steam boiler and steam plant ordinances, even though he is not regularly engaged in the business of repairing steam boilers.

Citations:

Ordinances: Code '22: 2222-2224, 3659-63.

Cases: Butchers' Union Slaughter House and Livestock Landing Co. v. Crescent City Live Stock Landing and Slaughter-
ing Co., 111 U. S. 746, 28 L. Ed. 585 (1884).
Schnaier v. Navarre Hotel and Importation Co., 182 N. Y. 83,
70 L. R. A. 722 (1905).
Davidson v. State, 77 Md. 388, 26 Atl. 415 (1893).
Landberg v. Chicago, 237 Ill. 112 (1908-09).
People v. Steele, 231 Ill. 340 (1907-08).

Other reference: Black, Constitutional Law, p. 559.

establishment ordinance (June 4, 1930). This enactment covers the subject of the handling and sale of food for human consumption. Such power is derived from the Cities and Villages act (SH '29, ch. 24), art. V, sec. 1, cl. 4, 41, 50, 52, 53, 66, 75, 78, 83, 91 and 102. The city's wholesale food establishment ordinance derives its power from the same source and has been upheld by the courts in *Chicago v. Arbuckle Bros.*, 344 Ill. 597 (1931) and *Chicago v. Great Atlantic and Pacific Tea Co.*, 282 Ill. App. 337 (1935). See also opinions on pp. 521, 522.

STEAM PLANT OPERATED BY UNLICENSED ENGINEER

(No. 7133—*President, Board of Examining Engineers—M. H. F.—September 17, 1931—2½ pp.*)

The operation of a steam plant by an unlicensed engineer constitutes an offense committed by both the unlicensed operator and also the owner or controller of the plant and both offenders may be prosecuted and punished by fine upon the determination of their guilt in a quasi-criminal proceeding instituted by the city in the Municipal Court of Chicago.

There are grave doubts as to the authority of the Board of Examining Engineers to shut down a steam plant found operating in violation of the city's ordinance.

Citation:

Ordinance: Code '31: 3761.

SECOND-HAND DEALER'S LICENSE, DEALERS IN PRECIOUS METALS*

(No. 8261—*Superintendent, Bureau of License Enforcement—M. H. F.—7 pp.*)

Establishments dealing in old gold and other old precious metals are subject to the second-hand dealers' license ordinance.

Citations:

Statute: Cities and Villages act, art. V, sec. 95.

Ordinances: Code '31: 3684-3733, as amended.

Cases: Chicago v. Moore, 351 Ill. 510 (1933).

Chicago v. Northern Paper Stock Co., 337 Ill. 194 (1930).

Eastman v. Chicago, 79 Ill. 178 (1875).

City of Duluth v. Bloom, 55 Minn. 97 (1893).

Other reference: 4 Words and Phrases, 3875 "junk shop."

Second-Hand Book Dealers: The city has no authority under the power "to tax, license, and regulate second-hand and junk stores" to require licenses of dealers in second-hand books or magazines, such shops not being in the nature of junk stores.—Chicago v. Moore, 351 Ill. 510 (1933).

Second-Hand Tire Dealers: Section 3685 of the City Code of 1931, relating to the licensing of second-hand stores, applies to a dealer in second-hand automobile tires, although he may also sell some new tires.—Chicago v. Peterson, 282 Ill. App. 260 (1935).

Power to License All Second-Hand Dealers: The City Council has the power to license, regulate and direct the location of all places of business of purchasers, traders, and dealers in junk, rags and any second-hand article whatsoever.—Ill. Laws (1935), p. 547.

*See also p. 529 on junk stores and dealers.

**TAXICAB LICENSE REVOCATION, FAILURE TO CARRY OUT
PROPOSED COLOR SCHEME***

(No. 8484—*Public Vehicle License Commissioner—J. F. G.—August 3, 1934—2 pp.*)

The Public Vehicle License Commissioner has authority to revoke, after investigation and hearing, the taxicab license of any licensee who fails to carry out his promises regarding the color scheme of his cabs which he made when applying for such license.

Citation:

Ordinance: Coun. J. (1934-35), p. 2271 (Public vehicle licensing ord., secs. 6, 9).

Taxicab License: The ordinance of the city creating a license commission and making a declaration of public convenience and necessity a condition precedent to securing a taxicab license is not an unconstitutional delegation of authority to the commission.—*Capital Cab Co. v. Cermak*, 60 F. (2d) 608 (1932).

**THEATER LICENSE REVOCATION, MOVIE EXHIBIT WITHOUT
PERMIT**

(No. 6502—*Commissioner of Police—W. V. D.—September 11, 1929—1 p.*)

The exhibition of any picture without first securing a permit is a valid justification for the revocation of a theater license.

Theater License Revocation: Revocation of a theater license by the Mayor was upheld by the Circuit Court of Appeals when such theater allowed the production of "Tobacco Road," a play found by the Mayor to be indecent and degrading, and that production was therefore in violation of city ordinances prohibiting indecent acts. The Mayor's action will not be disturbed by the courts unless he acted arbitrarily.—*Chicago v. Kirkland*, 79 F. (2d) 963 (1935).

UNDERTAKERS

(No. 8676—*President, Board of Health—M. H. F.—February 18, 1935—6½ pp.*)

Ordinance provisions which require the licensing of undertakers and which exact minimum qualifications as to their fitness are valid and

*See also opinions, p. 481, on licensing taxicabs and Opinion No. 7480, p. 668, on parking regulations for taxicabs.

enforceable in view of the health powers of the city and the power expressly given to it to regulate undertaking establishments.

Citations:

Statute: SH '33, 24.

Ordinances: Code '31: 3794-95.

Cases: Hagler v. Larner, 284 Ill. 547 (1918).

Biffer v. Chicago, 278 Ill. 562 (1917).

Chicago v. Wonder Heating and Ventilating Systems, 345 Ill. 496, 500 (1932).

Chicago v. Arbuckle Bros., 344 Ill. 597 (1931).

Village of Westville v. Rainwater, 294 Ill. 409 (1920).

Grundling v. Chicago, 177 U. S. 183 (1900).

Klever Karpel Kleaners v. Chicago, 323 Ill. 368 (1927).

UNDERTAKER'S LICENSE, EXAMINATION REQUIREMENTS*

(No. 6921—*Commissioner of Health—C. J. A.—May 29, 1931—3½ pp.*)

A person who has passed the examination for an undertaker's license may be licensed any time during the next five years without retaking the examination, on payment of all fees accruing since the date of his examination.

Citations:

Statute: SH '29, 111½: 66 (Embalming act, sec. 9).

Ordinance: Code '22: 1900.

UNDERTAKER'S LICENSE, APPLICATIONS AND RENEWALS*

(No. 8268—*President, Board of Health—B. J. K.—January 10, 1934—3 pp.*)

A person licensed as an undertaker should renew his license annually if he is to continue to do business as an undertaker.

A person who was formerly a licensed undertaker and who then gave up his business should have his present request treated as a new application for an undertaker's license.

Citations:

Ordinances: Code '31: 3794-95, 3799.

UNDERTAKER'S LICENSE, SECOND LICENSE FOR SAME PREMISES*

(No. 8072—*President, Board of Health—J. K. C.—May 20, 1933—1½ pp.*)

A second undertaker's license for a premise, on which the first license has not yet expired, should be issued (provided the applicant

*See also Opinion No. 8399, p. 417, on contagious disease burials, Opinion No. 8159, p. 445, on partnership liability in undertaking, and Opinion No. 8680, p. 587, on frontage consents for undertaking establishments.

is properly qualified) if the holder of the first license is no longer able to operate at that location.

Citation:

Ordinance: Code '31: 3795.

UNDERTAKER'S LICENSE, QUALIFICATION, EXAMINATION AND FEES

(No. 8453—President, Board of Health—M. H. F.—July 5, 1934—6 pp.)

The president of the Board of Health may require an applicant for an undertaker's license to show that he is properly qualified at the time he applies for an initial license or whenever he seeks a renewal thereof.

A person who passed the undertaker's examination three years before applying for a license is not required to pay license fees for the intervening period since he did not engage in the business; however, such applicant may be required to pass a new examination before the license is issued.

Citations:

Statutes: SH '33, 111½: 58-73.
Id., 24: 77.78.

Ordinances: Code '31: 2912, 3794-3804.

Other reference: Opinion No. 6921 (this volume, p. 545).

UNDERTAKER'S LICENSE, CONFLICT WITH STATE STATUTE

(No. 7680—President, Board of Health—C. J. A.—August 1, 1932—2 pp.)

The ordinance requiring that persons desiring a license as an undertaker must file a written application setting forth, among other things, that he is an embalmer licensed by the state is invalid as it conflicts with the state statutes and an undertaker cannot be prosecuted for advertising himself as such without having procured a state embalmer's license.

Citations:

Statute: SH '31, 111½: 60 (Embalming Regulation act, sec. 3).

Ordinances: Code '31: 3794-95, 3804.

UNDERTAKER'S LICENSE, ISSUANCE TO NEW PURCHASER

(No. 8614—*President, Board of Health—M. H. F.—January 5, 1935—*
2½ pp.)

The Department of Health may issue a license to the purchaser of an undertaking establishment to operate it, without requiring him to file new frontage consents.

Citations:

Ordinance: Code '31: 3797.

Other references: Op. Corp. Counsel (1911-12), p. 809.

Opinion No. 7762 (this volume, p. 429).

**UNDERTAKER'S LICENSE, FRONTAGE CONSENT
REQUIREMENTS**

(No. 8602—*President, Board of Health—M. H. F.—December 26, 1934—*
2 pp.)

When moving any undertaking establishment to be located on any boulevard, or in any block in any street in which one-third of the buildings on both sides of the street in such block are used exclusively for residential purposes, the necessary frontage consents must be obtained before a license may be issued; if not so located, frontage consents are unnecessary.

A separate undertaker's license is required for each place of business.

Citations:

Ordinances: Code '31: 2895-2928, 3794-3804.

**UNDERTAKER'S LICENSE, RECOMMENDATION OF
REVOCATION**

(No. 8522—*President, Board of Health—M. H. F.—October 15, 1934—*
2 pp.)

Where there is no specific violation of the undertaker's ordinance or of any law or ordinance relating to the occupation of undertaker or of any rule or regulation of the Department of Health, that department should not recommend to the Mayor a revocation of the undertaker's license.

Citation:

Ordinance: Code '31: 3796.

UNDERTAKER'S LICENSE, PROSECUTION FOR FALSE ADVERTISING

(No. 8677—Board of Health—M. H. F.—February 18, 1935—5½ pp.)

Unlicensed persons who advertise themselves as licensed undertakers and persons holding an undertaker's license who maintain the names of their licensed assistants in the classified telephone directory are subject to prosecution under the city's undertakers' license ordinance.

Persons who hold undertakers' licenses and maintain in the telephone book the names of other individuals to whom they succeeded in business (the former owner being no longer in the business) are subject to prosecution under the undertakers' license ordinance and probably under the deceptive advertising ordinance or under both.

There is no objection to maintaining in the telephone directory the name of a firm as being the proprietors of an undertaking establishment.

Citations:

Ordinances: Code '31: 3794-3804 (Undertakers' license ord.).

Id.: 4258 (Deceptive advertising ord.).

Other references: Op. Corp. Counsel (1905-06), p. 25.

Id. (1914-15), p. 382.

UNDERTAKER'S AND EMBALMER'S LICENSE, EFFECT OF PROPOSED STATE BILL

(No. 8012—President, Board of Health—L. H.—April 10, 1933—2 pp.)

The proposed bill (House Bill No. 415) regarding licensing of undertakers and embalmers might do away with the city's power to license them, but it does not alter the city's power with respect to the sanitary control of contagious disease funerals.

Citation:

Case: *Chicago v. Jensen*, 331 Ill. 129 (1928).

WHOLESALE ITINERANT PRODUCE DEALER'S LICENSE—PREORDERED DELIVERY FROM OUT OF STATE

(No. 8740—M. H. F.—April 11, 1935—2 pp.)

The wholesale itinerant produce dealers' ordinance applies to those wholesale produce dealers who truck their products into the city and deliver from place to place upon the city streets, selling or offering for sale at wholesale to wholesalers, retailers, chain establishments, and the like.

The wholesale itinerant produce dealers' ordinance does not apply to motor truck merchants who deliver potatoes from points outside of the state into the city by truck when the potatoes have been ordered previously by the buyers.

Citations:

Ordinances: Code '31: 3151-57(c).

**WHOLESALE ITINERANT PRODUCE DEALER'S LICENSE,
SALE AND DELIVERY BY OUT-OF-TOWN FIRMS**

(No. 8393—*City Clerk—R. N.—May 16, 1934—1½ pp.*)

Out-of-town firms selling and delivering pecan nuts to local merchants by truck are subject to the provisions of the wholesale itinerant produce dealers' ordinance.

Citation:

Ordinance: Code '31: 3151 (as amended Mar. 15, 1933).

Opinion No. 7917 of January 27, 1933 to the Mayor discusses the same point as the above opinion.

**WHOLESALE ITINERANT PRODUCE DEALER'S LICENSE,
APPLICATION TO FARMERS**

(No. 7984—*Secretary, Commission on Revenue—M. H. F.—March 27, 1933—3½ pp.*)

The wholesale itinerant produce dealers' license applies to all farmers and their agents who sell their products in the city, excepting *Illinois farmers* who sell the produce of their own farms at regularly established markets and *all farmers* who sell cattle in the city to licensed packing houses or to cattle commission firms.

Citations:

Statute: SH '31, 5: 9.

Ordinance: Wholesale itinerant produce dealers ord., Mar. 15, 1933.

Case: City of Quincy v. Burgdorf, 235 Ill. App. 560 (1924-25).

F. UNLICENSED ACTIVITIES

MAIL ORDER BUSINESS

(No. 8751—*C. N.—April 23, 1935—1 p.*)

No special license is required to operate a mail order business in the city.

**COLLECTIONS AND LANDLORD BUREAUS AND ACCIDENT
INVESTIGATION**

(No. 8759—*C. N.—May 3, 1935—1 p.*)

No license is required for a collection bureau or for accident investigations.

No license is required for a landlord bureau unless that bureau engages in the real estate business in which case a real estate broker's license must be obtained.

Citation:

Ordinance: Code '31: 3321-40.

PHRENOLOGY

(No. 7992—*Jud. G.*—April 3, 1933—1½ pp.)

The practice of phrenology does not require a license and, if it does not involve fortune telling, is not specifically prohibited by statute or ordinance.

Citations:

Statute: SH '29, 38: 290.

Ordinance: Code '31: 4254.

Opinion No. 7509 of March 24, 1932, is in accord with the above opinion.

SECURITIES SALES AND LOTTERIES

(No. 8230—*L. H.*—December 5, 1933—1½ pp.)

No license is required to sell security holdings but any disposal of those holdings by means of a lottery is contrary to law.

The city cannot license a lottery.

Citation:

Ordinance: Code '31: 4185.

HOUSE-TO-HOUSE SALE OF APRONS

(No. 7807—*C. J. A.*—November 14, 1932—1½ pp.)

No license is required for a business which consists of delivering a box containing aprons to a prospective customer without requiring a receipt and having an employee call to make the sale or to pick up the box of aprons if the customer is not interested.

Citations:

Ordinances: Code '31: 3573, 3575.

BANKRUPTCY OR INSURANCE SALES

(No. 7388—*City Clerk—M. H. F.*—December 16, 1931—2½ pp.)

A person advertising, representing or holding out that any sale of goods by him is an insurance, bankruptcy, or other sale enumerated by the statute is required to obtain a license.

A person who has previously purchased goods at an insurance, bankruptcy or like sale and who resells them in his own establishment is not required to have a license for such sale. This person could properly advertise the fact that the goods had been purchased at such a sale and, as a consequence, were being sold at reduced prices.

Citation:

Statute: SH '31, 121½: 1.

CHAPTER VIII

ZONING

INTRODUCTORY

Zoning is the creation by law of districts in which certain types of buildings and structures are prohibited or in which certain height, area, and use restrictions are established. Its purposes are many.

Zoning, for one thing, is designed to protect the social well-being of the citizenry. It does this by preventing disintegration of residential areas through the encroachment of factories or other commercial establishments with their attendant noise, odors, dirt and general unsightliness. Thus zoning is a form of insurance to citizens who erect homes in a residential area that they will not afterward be surrounded by factories and stores. In brief, it provides security as to certain environmental factors in urban living.

Moreover, zoning protects property values. Blighting of a residential area or commercial district through invasion of factories has the effect of diminishing the worth of the original commercial or residential structures and frequently the land values as well. It sometimes becomes necessary, as a result, to tear down buildings long before their normal period of usefulness has been exhausted. In large cities, this may cause financial waste mounting to millions of dollars.

Most important of all, zoning is an essential adjunct of city planning. It enables the city to design its growth and development, to allocate the use of urban land for maximum efficiency. One example is the ability to plan parks with the assurance that they will be in the center of residential areas and will not become useless through factory invasion.

Prior to the advent of zoning, persons owning property claimed protection from injury under the common law principle that one must not use his property rights as to infringe upon the same rights of another. Even before the advent of zoning, the courts frequently hinted that the districting of urban areas was necessary and valid.

Zoning is a development of the twentieth century. Its greatest growth has come since 1920. The City of Chicago first obtained zoning powers from the state through an enactment in 1921 and on April 16, 1923, the city passed a comprehensive zoning ordinance.

The responsibility for zoning regulation in Chicago rests upon the

City Council, the Zoning Board of Appeals, and the Commissioner of Buildings. The City Council has the duty of enacting zoning ordinances. The Commissioner of Buildings is entrusted with primary responsibility for the enforcement of zoning while the Board of Appeals is a quasi-judicial body which hears appeals from decisions of the Commissioner of Buildings, and decides whether the zoning ordinance has been correctly applied or whether a zoning variation should be recommended to the City Council for enactment.

Frontage consents, non-conforming uses, zoning amendments, and zoning restrictions are some of the important zoning problems. When are frontage consents required? When can frontage consents be revoked? What are the rights to a non-conforming use and when do these rights cease? What are the restrictions upon the power to amend the zoning ordinances? What uses are permitted or prohibited in a residential, apartment, or commercial district? What constitutes an evasion or violation of the zoning laws? These are some of the outstanding questions touched upon in this chapter.

A. GENERAL ADMINISTRATION OF ZONING

(1) *Zoning Board of Appeals*

ADMINISTRATION OF ZONING—POWERS OF BOARD OF APPEALS

(No. 7493—Board of Appeals—W. L. S.—March 15, 1932—5½ pp.)

The Commissioner of Buildings, and not the Board of Appeals, is responsible for the administration of the zoning ordinance and the abatement of zoning ordinance violations.

The powers of the Board of Appeals are to hold public hearings on appeals which are formally brought before it and which concern decisions of the Commissioner of Buildings and to pass on application for variations, recommending variations in proper cases.

Citations:

Ordinance: Zoning ord., secs. 25, 28.

Case: People v. Leo, 178 N. Y. S. 851 (1919).

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter informing us that the Commissioner of Buildings has submitted to you a list of violations of the Use District regulations of the zoning ordinance.

You wish to be advised as to the authority and responsibility of the Board of Appeals concerning these violations.

In response thereto we would respectfully state that the Board of Appeals has nothing whatsoever to do with the administration of the zoning ordinances except in cases that are formally presented to it in accordance with the terms of the law creating the board and fixing its power and duties, as it is elementary that public bodies like the Board of Appeals can only exercise such powers as are conferred upon them by law or by ordinance passed in pursuance of law.—115 Ill. App. 115.

The City Council under the terms of the State Zoning Enabling act was empowered, if it saw fit, to create a board of appeals. The City Council by ordinance created such board and conferred upon it only two functions, which are, as set forth in section 28 of the zoning ordinance, briefly as follows:

First: "Such board of appeals shall hear and decide appeals from and review any order, requirement, decision or determination made by the commissioner of buildings with reference to this ordinance. * * * Such an appeal may be taken by any person aggrieved or by an officer, department, board or bureau of the municipality. Such appeal shall be taken within such time as shall be prescribed by the board of appeals by filing with the commissioner of buildings from whom the appeal is taken and with the board of appeals a notice of appeal, specifying the grounds thereof * * * The board of appeals shall fix a reasonable time for the hearing of the appeal and give due notice thereof to the parties and decide the same within a reasonable time. * * * The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination as in its opinion ought to

be made in the premises, and to that end shall have all the powers of the commissioner of buildings from whom the appeal is taken."

Second: "Where in specific cases of applications for permits there are practical difficulties or particular hardship in the way of carrying out the strict letter of the provisions of this ordinance, the board of appeals shall have power on application to recommend variations of or from the original ordinance or amendments thereto. * * * Variations from this ordinance shall, in all cases be made by ordinance. Upon the report of the board of appeals the city council may adopt any proposed variation with or without change or may refer it back to the board for further consideration."

From the above it will be readily seen that the only powers vested in the Board of Appeals by law are, first, to hold public hearings on appeals formally brought before it concerning decisions of the Commissioner of Buildings to determine whether or not the acts of the Commissioner of Buildings appealed from are in conformity with the provisions of the zoning ordinance; and, second, to hold public hearings on applications for variations and recommend variations to the City Council in proper cases where it finds there are practical difficulties or particular hardship in the way of carrying out the strict letter of the zoning ordinance.

A careful examination of the State Zoning Enabling act and Chicago zoning ordinance will show that they contain nothing placing responsibility upon or giving authority to the Board of Appeals to enforce the provisions of the zoning ordinance except in so far as the board's duties are prescribed in cases that are formally brought before it by appeals or by applicants seeking variations.

As was said by the New York Supreme Court in the case of *People v. Leo*, 198 N. Y. Supp. 339, "It (board of appeals) passes upon matters formally brought to its attention much the same as courts. It hears evidence and arguments and decides controversies as the evidence dictates. It cannot act without some evidence."

Moreover the terms of the zoning ordinance which prescribe the powers and duties of the Board of Appeals also, in conformity with an explicit provision of the State zoning enabling statute, specifically commits the enforcement of the zoning ordinance to a different official of the city government, to-wit: the Commissioner of Buildings.

The State Zoning Enabling statute, by virtue of which the zoning ordinance was adopted, provides that "all ordinances passed under the terms of this Act shall be enforced by such officer of the city * * * as may be designated by ordinance."

Pursuant to that requirement Section 25 of the Chicago Zoning Ordinance contains the following designation:

"Section 25. Administration. This ordinance shall be enforced by the Commissioner of Buildings. The Commissioner of Buildings is hereby empowered and it shall be his duty to administer this ordinance in conjunction with the administration of such portions of the general ordinances of the City of Chicago as are commonly designated as the building code of the City of Chicago in such a manner as to facilitate their joint administration. For the purpose of enforcing this ordinance the authority vested in him under the said building code is hereby declared to be vested in him under this ordinance."

In view of the above it is clear that the enforcement of the zoning ordinance is explicitly placed by law upon the Commissioner of Buildings. He has ample authority to enforce the zoning ordinance and it is his duty and responsibility to do so.

The only concern the members of the Board of Appeals might have in the matter of the enforcement generally of the zoning ordinance, or in

regard to violations of it, is their desire in common with other citizens to see that the laws should be enforced. But the responsibility under the law to see that violations of the zoning ordinance are abated, is that of the Commissioner of Buildings and not of the Board of Appeals.

DEPUTY ACTING FOR THE MAYOR, DEPARTMENT OF BUILDINGS

The duties and functions of the office of Commissioner of Buildings are at present exercised by a deputy acting for the Mayor. The office of Commissioner of Buildings was abolished by ordinance December 22, 1931.—Coun. J. (1931-32), p. 1569.

APPEAL FROM PERMIT DENIAL—ASPHALT FACTORIES

(No. 7541—*Deputy Acting for the Mayor, Department of Buildings—W. L. S.—April 14, 1932—5½ pp.*)

Under the zoning ordinance the Mayor's deputy in the Department of Buildings performs purely ministerial duties and he must apply the ordinance according to its terms.

A factory used for the preparation of street paving material with an asphalt base may properly be considered as property used "for asphalt, manufacturing or refining" and a permit for such use should be refused under the zoning ordinance when such property is situated within 500 feet of a commercial district or within 2,000 feet of an apartment district.

An owner of property who has been refused a permit to use his property for certain purposes may present his case for decision before the Board of Appeals which may decide according to the intent of the zoning ordinance and if not satisfied with the Board's decision, he may take the case to the courts upon certiorari proceedings.

Citations:

Statutes: SH '33, 24: 66-70.

Ordinance: Code '31, part VI (Zoning ord.).

Other reference: Webster's New International Dictionary, "asphalt."

POWER TO GRANT HEARING OF PERMIT DENIAL

(No. 7201—*W. L. S.—October 21, 1931—1½ pp.*)

The Zoning Board of Appeals could grant a hearing to the denial of a permit by the Commissioner of Buildings only in two situations: (1) that the Commissioner of Buildings has made an erroneous decision as a matter of law in refusing to grant a certificate of occupancy for a proposed use of the premises if such use conforms to the ordinances, or (2) if the strict letter of the ordinance should be varied because of a particular hardship in the application of the ordinance, as it exists, to the property in question.

EFFECT OF APPEAL FROM BUILDING COMMISSIONER'S DECISION*

(No. 6501—Alderman, 40th Ward—E. C. H. and F. J. C.—September 10, 1929—10½ pp.)

An amendment to the zoning ordinance must specify the area, volume and height of buildings which may be constructed under such an amendment.

A property owner affected by any building proposed to be built under the zoning ordinance may appeal to the Zoning Board of Appeals from the decision of the building commissioner in issuing the permit for the building; when such an appeal is taken under the statute and under the ordinance, it stays all proceedings under the decision appealed from until such time as the Board of Appeals has rendered its decision.

Citations:

Ordinances: Zoning ordinance, secs. 15, 18, 20, 21 as amended June 14, 1929.
Statute: Zoning act, sec. 3.

REVIEW OF ZONING DECISIONS—RIGHTS UNDER PERMIT ERRONEOUSLY GRANTED*

(No. 8698—W. L. S.—March 9, 1935—1½ pp.)

The Board of Appeals has power to review any decision of the Commissioner of Buildings with reference to the enforcement of the Zoning ordinance, the board's decision can be reviewed by the courts on a writ of certiorari.

The granting of a building permit by the Commissioner of Buildings under a mistake of law or mistake of fact can confer no rights on the person to whom the permit was issued.

Court Appeals: Appeals shall lie to the Appellate or Supreme Courts to review the final orders, judgments or decrees of the court reviewing a decision of the Zoning Board of Appeals as in other civil cases.—Ill. Laws (1935), p. 270.

VARIATION OF ZONING ORDINANCE BY BOARD OF APPEALS

(No. 6680—Commissioner of Buildings—F. J. C.—May 26, 1930—3½ pp.)

The Board of Appeals has no power to grant a variation of the

*See also Opinion No. 6570, p. 566, on zoning decisions of the Commissioner of Buildings.

regulations of the zoning ordinance, and thus a resolution allowing an extension of time for a variation granted is invalid.

Citations:

Cases: *Welton v. Hamilton*, 344 Ill. 82, 176 N.E. 333 (1931).

Opinion No. 6835 of February 14, 1931 to the Chairman of the Zoning Board of Appeals discusses the same point as the preceding opinion.

Zoning Variations: In *Welton v. Hamilton*, 344 Ill. 82 (1931), the Illinois Supreme court held that the section of the zoning act providing that "where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance, the Board of Appeals shall have the power in passing upon appeals, to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures or the use of land" constituted an unconstitutional delegation of legislative authority as the statute provided no standard for determining what are practical difficulties or unnecessary hardships, sufficient to justify a variation but left those questions to be determined by the discretion of an administrative board.

Similar powers of a zoning board of appeals to vary the application of zoning provisions were held constitutional as not constituting a delegation of legislative power by the Ohio Supreme Court.—*L & M Investment Co. v. Cutler*, 125 Oh. St. 12 (1932).

For an annotation of cases holding such powers of variation by the Zoning Board of Appeals to be constitutional and those cases holding similar provisions unconstitutional see 86 A. L. R. 715.

On July 30, 1931, the City Council amended section 28 of the zoning ordinance concerning the powers of the Board of Appeals and authorized the board only to recommend variations from the zoning ordinance in cases of practical difficulty or particular hardship. Variations must be adopted by the ordinance of the City Council.—*Coun. J. (1930-31)*, p. 925.

Regulations authorized by the act may provide that city councils, by ordinance, may determine and vary the application of the zoning ordinance but no such variation shall be made by such city council without a hearing before a board of appeals.—*Ill. Laws (1933)*, p. 288.

The phraseology of section 28 of the zoning ordinance was changed on January 3, 1934, to conform to the provisions of the state law.—*Coun. J. (1933-34)*, p. 1362.

Opinions No. 6480 of July 30, 1929, to the Chairman of the Committee on Buildings and Zoning and No. 6544 of November 18, 1929, to the Board of Appeals discuss the same point as the above case of *Welton v. Hamilton*.

CONTENT OF ZONING VARIATION RESOLUTION*

(No. 8919—*Chairman, Board of Appeals—O. F. W.—November 8, 1935*
—1½ pp.)

A resolution for a zoning variation by the Board of Appeals should include not only a statement that a hardship exists but also a specification of the facts from which the conclusion is reached.

Citation:

Statute: SH '35, 24: 68.

*See also opinions, pp. 565, 566, on zoning variations.

QUORUM OF ZONING BOARD OF APPEALS

(No. 8890—*The Board of Appeals*—L. V. R.—October 3, 1935—1½ pp.)

A majority of the members of the Board of Appeals constitute a quorum to transact business, but to take affirmative action at any meeting, at least four members must be present and concur.

Citation:

Statute: Ill. Laws (1933), p. 288 (Zoning Enabling act, amended).

REIMBURSEMENT FOR EXPENSES

(No. 7578—*Chairman, Board of Appeals*—W. L. S.—May 16, 1932—3 pp.)

There is no legal objection to the members of the Board of Appeals being reimbursed by the city for monies actually paid out by them in connection with their duties as members of the Board, even though the ordinance creating the board says that members shall receive no compensation from the city for their services as members.

When no legal fund exists out of which to pay a bill rendered for money paid out by the members of the Board of Appeals in connection with their duties, the chairman of the board should recommend to the Committee on Finance the insertion of an item in the annual appropriation ordinance for the Board of Appeals "for expenses of members in making official inspections including unpaid bills."

(2) *Construction of Zoning Ordinance*

CLASSIFICATION OF BUILDINGS—HOUSING MINIATURE GOLF COURSE*

(No. 6764—*Commissioner of Buildings*—F. J. C.—September 4, 1930—4 pp.)

When it is proposed to establish a miniature golf course in buildings, the Commissioner of Buildings has power to classify the buildings, by inspecting the type of buildings involved, as provided by the zoning ordinance and the building code.

Citations:

Ordinances: Code '22: 494.
Zoning ord., sec. 4.

*See also Opinion No. 6585, p. 588.

LESS RESTRICTED USE—ERECTION OF HOSPITAL NEAR GARAGE

(No. 6481—Commissioner of Buildings—F. J. C.—August 1, 1929—3 pp.)

Under the building code, a hospital may be erected within 200 feet of a garage; this procedure does not violate the zoning ordinance, as a less restricted use may always be imposed on a more restricted use.

Citation:

Ordinance: Code '22: 246.

INTERPRETATION OF "FRONT STREET LINE"

(No. 8585—Deputy, Acting for the Mayor, Department of Buildings—W. L. S.—December 10, 1934—5½ pp.)

The front street line of a corner lot, under the zoning ordinance, is the street line of the shortest length.

Citations:

Ordinance: Zoning ord., sec. 22.

Other reference: Op. Corp. Counsel (1923-24), p. 609.

MEANING OF "BLOCK"—WITHDRAWAL OF FRONTAGE CONSENTS

(No. 6923—Commissioner of Health—C. J. A.—June 2, 1931—3½ pp.)

A "block" is that part of a street lying between the two nearest intersecting streets.

A property owner may withdraw his consent to the establishment of an undertaking business at any time before the petition is acted upon by the proper authorities.

Citations:

Ordinances: Code '22: 920, 931.

Cases: Harrison v. People, 195 Ill. 466 (1902).

Patterson v. Johnson, 214 Ill. 481 (1909).

People v. Oakwood, 290 Ill. 45 (1920).

Theurer v. People, 211 Ill. 296 (1904).

MEANING OF "PLOT"—GAS STATION INSTALLATION*

(No. 6896—Division Fire Marshal in Charge of Fire Prevention—L. H.—May 7, 1931—2½ pp.)

The installation of a gasoline filling station on a part of a lot is permissible, since part of a lot constitutes a "plot" within the meaning of the ordinance regulating such installation.

Citation:

Ordinance: Code '22: 2279.

*See also Opinion No. 7809, p. 584.

CONSENT TO UNAUTHORIZED USE—PARKING PLACE NEAR HOSPITAL

(No. 8436—Deputy, Acting for Mayor, Department of Buildings—*W. L. S.*—June 14, 1934—1 p.)

A public parking place may not be operated within 200 feet of a hospital, even though the superintendent of the hospital consents to such parking space, as this prohibition is for the benefit of the inmates of the hospital and not for those operating the hospital.

DEFINITION OF "HOSPITAL"*

(No. 6812—Commissioner of Health—*M. H. F.*—December 17, 1930—5½ pp.)

The definition of "hospital" as used in the City Code includes any institution used for the harboring, receiving, caring or treating of two or more persons suffering from or afflicted with any mental or physical disease, bodily injury, alcohol or drug addiction.

Citations:

Ordinances: Code '22: 1850, 1873.

USE OF PROPERTY FRONTING ON TWO DIFFERENTLY ZONED STREETS

(No. 6623—Commissioner of Buildings—*F. J. C.*—March 20, 1930—5 pp.)

Property which fronts on two or more streets zoned for different uses may be used for the least restricted use.

Section thirty-three of the zoning ordinance leaves section 929 of the Code of 1922 in effect.

Citations:

Ordinances: Code '22: 929.

Zoning ord., sec. 33.

STATUS OF RAILROAD PROPERTIES UNDER ZONING ORDINANCE

(No. 6510—*F. J. C. and E. C. H.*—September 17, 1929—4½ pp.)

No special provision is required in the lake front ordinance, with reference to the class or character of buildings that may be erected on the railroad companies' properties, to obtain compliance with the zoning laws.

Where the railroad companies' property is so located and zoned that

*See Opinion No. 6526, p. 581, on frontage consents for hospitals.

it comes under a classification least restricted under the zoning ordinance, its present status cannot be changed except by an amendment of the zoning ordinance.

The zoning ordinance does not allow railroad companies, for railroad purposes, to erect a building in excess of the height which would be permitted by the zoning ordinance, except as prescribed in paragraph (c) of section twenty-one of the zoning ordinance.

Citation:

Ordinance: Zoning ordinance, secs. 2, 11, 20, 21.

UNREASONABLE REGULATION—SEPARATION OF DRY CLEANING BUILDINGS*

(No. 6492—*Division Marshal in Charge of Fire Prevention—F. J. C.—August 14, 1929—3 pp.*)

The restriction of section 1416 of the City Code providing that dry-cleaning buildings are to be detached from other buildings, or to be apart from adjoining property by at least fifty feet, is an unreasonable regulation and unconstitutional.

Citations:

Ordinance: Code '22: 1416.

Case: Klever Shampay Karpel Kleaner v. Chicago, 238 Ill. App. 291, 307 (1925).

LOCATION OF JUNK YARDS†

(No. 8965—*Deputy, Acting for Mayor, Department of Buildings—L. V. R.—December 11, 1935—2 pp.*)

The section of the zoning ordinance which prohibits a junk yard on any street where there is a street railway line does not apply to streets on which a bus is being operated as a surface line extension.

The storage of iron, junk and the like is classed as an M-1 use and is permitted in a manufacturing district.

Citation:

Ordinance: Code '31: 1872.

CLASSIFICATION OF FOUNDRIES—PROSECUTING ZONING VIOLATION

(No. 8076—*Deputy, Acting for Mayor, Department of Buildings—W. L. S.—May 22, 1933—4 pp.*)

When the total melting pot capacity of a foundry is in excess of

*See Opinion No. 7143, p. 593, on the zoning of dry cleaning establishments.

†See also opinions, pp. 529, 530, on the licensing of junk dealers.

500 pounds, the use is not within the C-2 use classification of the zoning ordinance.

Where a foundry is operated in violation of the zoning ordinances, and there is no eminent danger to property or life, resort should be made to regular court procedure rather than a "police stop order."

Citation:

Ordinance: Zoning ord., secs. 8, 26, 30.

*(3) Amendment of Zoning Ordinance**

RESTRICTION TO ZONING AMENDMENTS—PUBLIC GOOD

(No. 7597—Commissioner of Public Works—W. L. S.—June 7, 1932—7½ pp.)

An amendment to the zoning ordinance is not valid if it cannot be shown that the ordinance is for the public good. Where the only reason for the enactment of an ordinance is to make lawful what is at present an unlawful use of property by four stores, and no other purpose can be shown, the proposed amendment to the zoning ordinance cannot be said to be for the public good.

Citations:

Statute: Zoning act, sec. 4.

Cases: Phipps v. Chicago, 339 Ill. 315 (1930).

Michigan Lake Building Corp. v. Hamilton, 340 Ill. 284 (1931).

Kennedy v. City of Evanston, 348 Ill. 426 (1932).

OPINION OF FOREGOING SYNOPSIS

This will acknowledge the receipt of your communication.

The letter to you relates to the propriety of permitting either by amendment or variation of the zoning ordinance the continuance of four stores existing unlawfully at the present time in the basement of a three story apartment building, which premises were placed by the original zoning ordinance in an apartment district. The letter suggests that, if an amendment to the zoning ordinance would not be proper, a variation be recommended by the Board of Appeals to the City Council "to permit the owner of this property to continue the use of the basement stores in question."

The secretary of the Board of Appeals, to whom you referred the letter, has informed you, and properly so, that the Board of Appeals could not consistently recommend the granting of a variation in this case as it does not fall within any of the specific rules for variations set forth in the zoning ordinance, but she has suggested that both sides of the street for a distance of 125 feet north and south be rezoned by amendment for commercial uses.

You wish to be advised as to the legality of the proposed amendment.

The premises in question are improved with a three story apartment building but four retail stores have found their way into the basement of said apartment building and are now operating there in violation of the

*See Opinion No. 6501, p. 556, on the content of an amendment to the zoning ordinance.

zoning ordinance. These premises and the entire square block in which they are located were placed by the original zoning ordinance in an apartment district.

In this whole square block there is no vacant property, but the square block is entirely built up with three story apartment buildings. Neither is there a lawfully existing commercial use in this entire square block. Across the street is a park but the block across the street on 58th street is also entirely built up with three story apartment buildings and in the square block, of which the north side of 58th street is the southern boundary, neither is there any vacant property nor commercial uses. That entire square block is also improved with apartment buildings.

An amendment was introduced through the City Clerk to rezone the property to a commercial district. After a public hearing before the City Council Committee on Buildings and Zoning, the City Council placed the amendment on file on the recommendation of its Committee on Buildings and Zoning. The amendment was again referred by the City Council to the committee on Buildings and Zoning and was recommended by the latter committee to the Council for passage. It was passed by the City Council and vetoed by the Mayor on your recommendation. It was once more, however, re-referred to the Committee on Building and Zoning and recommended for passage, and is now again pending before the City Council.

In response to your request for our views as to the legality of the proposed amendment, we are constrained to advise you at the outset that we have grave doubt, to say the very least, that the proposed amendment could ever be sustained in the courts, if litigated.

In the case of *Phipps v. City of Chicago*, 339 Ill. 315, in holding invalid an amendment to the Chicago zoning ordinance, which sought to change the zoning of certain property in the northwest part of the city from commercial and industrial uses to apartment and residence uses, our Supreme Court said:

"When appellant (City of Chicago) passed the original zoning ordinance its powers were not exhausted. It could amend the ordinance. But the power to amend was not arbitrary and could not be exercised merely because someone wanted it done or thought it ought to be done. It could only be exercised when the public good demanded or required that the amendment be made. When appellees bought the land they had a right to rely upon the classification which existed at the time the purchase was made. They also had a right to rely upon the rule of law that the classification would not be changed unless the change was required for the public good. The reasons for making the change are found in the stipulation upon which the case was tried. The only changed condition which could possibly justify the amendment is that between April 5, 1923, and May 19, 1926, other territory in the immediate neighborhood had been changed from commercial uses to residence purposes and that numerous two-apartment buildings had been built. There was evidence tending to show that the amendment was made because certain parties wanted it made so they could build more buildings for residence purposes. When all the facts contained in the stipulation are considered they do not show such a requirement for the public good as justified the amendment to the classification."

In *Michigan Lake Bldg. Corp. v. Hamilton*, 340 Ill. 284, in holding invalid another amendment of the Chicago zoning ordinance which sought to increase the street line height limit in the Fifth Volume district as applied to certain locations our Supreme Court said:

"* * * Undoubtedly, under section 4 of the zoning statute, proper and necessary amendments to an original zoning ordinance are authorized * * *. However, in the instant case there appears to have been no

consideration given or allowance made for existing conditions, for the conservation of property values, or for the direction of building development to the best advantage of the entire city. There is not a word in the record pertaining to the necessity of the amendatory ordinance or to its benefit to the public welfare in any manner. We are of the opinion that the passage of the amendment under present conditions was clearly an arbitrary and unreasonable action on the part of the city council and not authorized by or contemplated under the zoning statute."

In *Kennedy v. City of Evanston*, decided by our Supreme Court at the April term, 1932, the court in holding invalid an amendment to the zoning ordinance of the City of Evanston, which sought to change the zoning of fifty-six lots from a single family dwelling to an apartment district, said:

"* * * Where the amendment of a zoning ordinance is clearly an arbitrary and unreasonable action on the part of the city council and not authorized or contemplated by the zoning statute it is of no force and effect * * *."

Testing the proposed ordinance by the principles announced in the above cases, we think that of its illegality there would not be much question. Its history is that the City Council after a public hearing first refused to modify the original zoning classification. Then with no change in conditions it later did change the classification but the Mayor vetoed the amendatory ordinance. The matter is now again pending before the City Council.

The only reason for its enactment would be to endeavor to make lawful the present unlawful use of property by the four stores in question. No other purpose could be shown. The square block in which the stores are located and the square block across the street are entirely built up with apartments. They contain no legally established commercial uses. The amendment of the ordinance could not be shown to be for the public good but would be made because someone wanted it done or thought it should be done. This would not be a compelling reason for amending the zoning ordinance nor in accordance with the principles announced in the decisions of our Supreme Court hereinabove referred to.

Unreasonable Amendment: The power of the City Council to amend the zoning ordinance is subject to review by the courts and an amending ordinance was held void which changed a commercial and manufacturing district into a residence zone when the public good did not necessitate the change.—*Phipps v. Chicago*, 339 Ill. 315 (1930).

Unreasonable and Arbitrary Amendment: The amendment of June 14, 1929 to the zoning ordinance, which increased the authorized height of buildings in the Fifth Volume district from 264 to 440 feet, was held invalid as being unreasonable and arbitrary under the circumstances.—*Michigan Lake Building Corp. v. Hamilton*, 340 Ill. 284 (1930).

**CITY COUNCIL HEARING FOR AMENDMENT—LIQUOR STORE
IN COMMERCIAL DISTRICT***

(No. 8912—Mayor—L. V. R.—November 6, 1935—1½ pp.)

No amendment to the zoning ordinance may be made without a hearing before a committee designated by the City Council.

A hotel in a commercial district, if properly licensed, may operate a liquor store.

Citation:

Statute: ISBS '35, 24: 524.

PUBLIC HEARING AND NOTICE IN REZONING

(No. 8922—O. F. W.—November 9, 1935—1 p.)

Before any ordinance transferring property from one zone to another can be passed, a public hearing is necessary and notice must be given to the owners of the property on the block where the property to be rezoned is located.

BASIS OF ZONING VARIATIONS†

(No. 8729—W. H. S.—March 25, 1935—2 pp.)

Zoning variations may never be based upon the financial status of the applicant, but must be in the public interest.

Citation:

Case: Colman v. Board of Appeals, 183 N. E. 166 (Mass. 1932).

APPLICATION OF ZONING VARIATION†

(No. 6911—Acting Commissioner of Buildings—L. H.—May 22, 1931—2½ pp.)

An ordinance allowing a zoning variation allows the variation regardless of whether the original petitioner for the variation or another person applies for a permit under the ordinance.

Citation:

Ordinance: Coun. J. (1930-31), p. 4747.

*See also Opinion No. 8165, p. 567, on zoning amendment hearings.

†See also opinions on pp. 556, 557, Opinion No. 7909, p. 575 on zoning variations, and Opinion No. 7504, p. 591, on a store operated in an apartment district.

ZONING VARIATION AFTER REPEAL OF VARIATION ORDINANCE—CHANGE OF NON-CONFORMING USE*

(No. 8825—*Deputy, Acting for Mayor, Department of Buildings—W. L. S.—July 23, 1935—3½ pp.*)

An applicant, who did not act on an ordinance granting him a zoning variation until after the ordinance had been repealed, is not entitled to a building permit or certificate of occupancy for the variation.

A milk depot use being a C-3 use and more restricted than a C-1 use, premises housing a non-conforming C-1 use cannot be changed to house the milk depot.

Citations:

Ordinances: Coun. J. (1931-32), p. 521 (Zoning Variation ord., repealed, Coun. J., July 10, 1935).

CHANGE OF USE DISTRICT—COMMERCIAL DISTRICT

(No. 6486—*Alderman—F. J. C.—August 6, 1929—8 pp.*)

Where a commercial use district is established by an amendment to the zoning ordinance, it can be changed only by the establishment of a new district through an amendment to the zoning ordinance.

Citations:

Ordinances: Coun. J., Feb. 4, 1929, pp. 4594-4595 (Repealing ord., secs. 1, 2).

Id., Apr. 16, 1923, p. 2396 (Zoning ord., sec. 29).

Id., Dec. 19, 1928, p. 4186 (Amending ord.).

Statute: SH '27, 24: 69.

EFFECT OF ZONING CHANGE ON EXISTING USE*

(No. 8266—*Chairman, Committee on Building and Zoning—W. L. S.—January 10, 1934—3½ pp.*)

When the use of property is once established by an original zoning ordinance or an amendment to it, that use, unless voluntarily abandoned or relinquished by the owner of the property, may not be subsequently interfered with, regardless of any zoning legislation passed by the City Council.

FINALITY OF ZONING DECISION—BUILDING COMMISSIONER'S LIABILITY—AMENDING ZONING ORDINANCE

(No. 6570—*Committee of City Council on Cuneo Permit and Amendment—F. J. C.—December 20, 1929—17 pp.*)

The amendment of June 14, 1929, to the zoning ordinances is invalid, and building permits issued under the amendment are invalid.

*See footnote (†), p. 565; also pp. 567-575 on non-conforming uses.

An ordinance can be repealed or amended only by the enactment of another ordinance, and a mere Council order changing the terms or provisions of existing ordinances has no legal force or effect.

A decision of the Commissioner of Buildings does not become final until the time for appeal to the Board of Appeals has elapsed.

A person who obtains a building permit has no final right under that permit until the time for appeal to the Board of Appeals has elapsed.

The city's ordinances protect and indemnify the Commissioner of Buildings against loss when he acts in good faith and under authority vested in the City Council.

The City Council can appropriate money to reimburse the Commissioner of Buildings for any personal liability which he may incur under the city's ordinances.

Citations:

- Ordinances: Code '22: 400; Zoning ord., sec. 25.
Coun. J. (1929-30), p. 557, repealed, Oct. 17, 1929.
- Statute: Zoning act (1923), sec. 3.
- Other references: Op. Corp. Counsel (1916-19), p. 445.
2 McQuillin, Mun. Corp. (2nd ed.), sec. 532.

EFFECT OF INVALID ZONING AMENDMENT REPEAL

(No. 6715—Commissioner of Buildings—F. J. C.—July 11, 1930—1 p.)

Where a repeal of a zoning ordinance changing an apartment district to a commercial district was of no force and effect, the Commissioner of Buildings may restore the commercial symbols to the district map.

Citation:

- Other reference: Opinion No. 6486 (this volume, p. 566).

(4) Non-Conforming Uses

NON-CONFORMING USE UNDER NEW ZONING ORDINANCE— PUBLIC HEARING AND NOTICE

*(No. 8165—Deputy, Acting for the Mayor, Department of Buildings—
W. L. S.—September 5, 1933—8 pp.)*

A non-conforming use existing at the time of the passage of the zoning ordinance may be continued.

A use which becomes non-conforming because of an amendment or repeal of a zoning ordinance may be continued notwithstanding that

the use does not comply with the subsequent zoning regulations of the use district.

Where the zoning enabling act provided that the zoning ordinance may not be amended without a public hearing and public notice, a zoning ordinance not passed in conformity therewith is void.

Citations:

Statute: SH '33, 24: 66.

Ordinances: Code '31: 1871, 1887.

Cases: Jones v. City of Los Angeles, 211 Cal. 304 (1930).

Pessner v. Chicago, 318 Ill. 131 (1925).

Armourdale State Bank v. City of Kansas City, 131 Kan. 419 (1930).

Scofield v. City of Los Angeles, 7 P. (2nd) 1076 (Cal., 1932).

OPINION OF FOREGOING SYNOPSIS

July 10, 1931, the City Council, after public notice and a public hearing as required by the zoning enabling statute, passed an ordinance amending the original zoning ordinance by changing from an apartment district to a commercial district the area bounded by South Central Park avenue, West 58th place, South Lawndale avenue, and the alley next south of West 58th place.

At 3604-3612 West 59th street, adjacent to part of the above area, there is located the plant of the Chicago Lawn Pure Ice company whose buildings were erected previous to the passage of the amendatory zoning ordinance of July 10, 1931, above referred to. Upon the taking effect of such amendatory zoning ordinance the ice company, according to your letter, commenced the manufacture of ice for purposes of sale which has been continued to date.

The premises occupied by the ice company were placed by the original zoning ordinance in a commercial district and still remain so zoned. The manufacture of ice for purposes of sale is classified by the zoning ordinance as a C-3 use. A C-3 use may be established in a commercial district but only if the premises upon which the C-3 use is established are not within 125 feet of an apartment district. As the result of the amendment of the zoning ordinance of July 10, 1931, the premises of the ice company became further removed than 125 feet from an apartment district and hence their use for manufacture of ice for purposes of sale became lawful upon the taking effect of such amendment to the zoning ordinance.

The City Council on July 11, 1933, passed an ordinance purporting to repeal the amendatory zoning ordinance adopted two years before on July 10, 1931.

A committee from the Lawn Civic association office at 3908 West 63rd street has now requested you to direct the Chicago Lawn Pure Ice company to discontinue the use of its premises for the manufacture of ice for purposes of sale. The contention of the committee is that such use of the premises is at the present time in violation of the zoning ordinance in that whatever rights may have accrued to the ice company by reason of the amendment to the zoning ordinance of July 10, 1931, have been abrogated by the repeal on July 11, 1933, of such amendatory ordinance. In other words, the committee asserts that a use lawful for two years under the provisions of the zoning ordinance as amended now becomes unlawful because of the action of the City Council on July 11, 1933, in repealing the amendatory ordinance.

You ask that we advise you as to your proper action in the situation presented. The answer to your query requires a brief consideration of zoning principles, the zoning ordinance and the state zoning enabling act.

The state zoning enabling act from which the City of Chicago derives all its powers as to zoning contains the following limitations upon the authority of the City Council:

"In all ordinances passed under the authority of this act, due allowance shall be made for existing conditions, the conservation of property values, the direction of building development to the best advantage of the entire city, village or incorporated town, and the uses to which property is devoted at the time of the enactment of any such ordinance. The powers of this act given shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted."

The powers given to the city under the State Zoning Enabling act are, briefly, to pass an original zoning ordinance covering the entire city and to pass such amendatory zoning ordinances as the City Council deems appropriate. But the City Council may not exercise its powers by the original zoning ordinance or by amendatory zoning ordinances, or otherwise, under the enabling act in such a way as "to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted."

Pursuant to the limitations prescribed in the zoning act, the zoning ordinance provides in section 14 that a non-conforming use (which is a use that does not comply with the regulations of the use district in which it is situated) existing at the time of the passage of the zoning ordinance may be continued. And section 29 which provides the procedure which must be followed in amending the zoning ordinance also contains the following provision:

"If any area is hereafter transferred to another district by a change in district boundaries by an amendment, as above provided, the provisions of this ordinance in regard to buildings or premises existing at the time of the passage of this ordinance shall apply to buildings or premises existing at the time of passage of such amendment in such transferred area."

Thus, a use which becomes non-conforming because of amendment of the zoning ordinance may be continued notwithstanding the use does not comply with the subsequent zoning regulations of the use district.

Zoning ordinances, whether original zoning ordinances or amendatory zoning ordinances, are prospective and are not and could not under the provisions of the Zoning Enabling statute be retroactive. Zoning always looks to the future. When the use of property is once lawful under an original zoning ordinance or an amendment thereto, such use of property, unless voluntarily abandoned or relinquished by the owner, may not, under the limitations contained in the Zoning Enabling act be subsequently interfered with regardless of any zoning legislation passed by the City Council.

In the case of *Jones v. City of Los Angeles*, 211 Cal. 304, in holding that a zoning ordinance may not interfere with existing uses of property even where the zoning act does not provide that zoning ordinances passed thereunder may not be retroactive, the Supreme Court of California in a leading case on the subject said:

"In other words, does the broad view of the police power which justifies the taking away of the right to engage in such business in certain

territory, also justify the destruction of existing businesses? We do not think that it does. * * * Indeed, in some states, including Kansas, Ohio, Wisconsin, Illinois, Massachusetts, Maine and New Hampshire, the enabling statutes which give the zoning power to municipalities expressly provide that no retroactive ordinances shall be passed. * * * "

Upon the taking effect of the amendatory zoning ordinance of July 10, 1931, there accrued to the ice company the right to use its premises for the manufacture of ice for purposes of sale and that right so long as it is not voluntarily relinquished or abandoned by the owner continues to exist. The Commissioner of Buildings, after an interval of two years, as in this case, has no power to interfere with the right of the ice company to manufacture ice for purposes of sale notwithstanding any zoning legislation the City Council may enact or any zoning legislation it may repeal.

Your letter also contains the statement that the effect of the repealing ordinance of July 10, 1933, is to restore the area specified in such repealing ordinance from a commercial to an apartment district. That does not necessarily follow. The area in question was placed by the original zoning ordinance in an apartment district. By the amendatory zoning ordinance of July 10, 1931, placing such area in a commercial district, that part of the original zoning ordinance placing the area in an apartment district was repealed. Does then the repeal on July 11, 1933, of the repealing ordinance of July 10, 1931, have the legal effect of reviving the ordinance repealed, and placing the area in the classification of an apartment district given it by the original zoning ordinance?

In the case of *Peisner v. City of Chicago*, 318 Ill. 131, our Supreme Court said:

"The rule of the common law that where one statute is repealed by another, the repeal of the repealing statute revives the statute repealed does not apply to municipal ordinances, particularly in view of the general rule of public policy of the state indicated by section 3 of chapter 131 of the Revised Statutes. * * * There is no statute saving rights accruing under a municipal ordinance which has been repealed by a later ordinance having no clause saving such rights."

Under the rule announced in the above case, if we were to assume that the repealing ordinance of July 11, 1933, is a valid enactment, we would be constrained to hold as a matter of law that the area specified in such repealing ordinance is not now in any use district classification so far as zoning is concerned.

Consequently, if the repealing ordinance of July 11, 1933, were a valid enactment, it would not have the effect of causing the premises of the ice company to be within one hundred and twenty-five feet of an apartment district even if it would make any difference to the present right of the ice company to use its premises for the manufacture of ice for purposes of sale.

While it might also be argued that the repealing ordinance of July 11, 1933, is invalid because there was no public hearing thereon after public notice as required relative to amendments to the zoning ordinance by both the zoning enabling statute and the zoning ordinance, yet we do not think it necessary to discuss that question now, other than to say that where zoning enabling acts have provided that zoning ordinances may not be amended without public hearing and public notice, the courts have held that zoning ordinances not passed in conformity with the requirements of the statute are void. *The Armourdale State Bank v. The City of Kansas City*, 131 Kan. 419; *Scotfield v. City of Los Angeles*, 7 P. (2nd) 1076. Whether the repealing ordinance of July 11, 1933, is valid or void, you would in our opinion have no legal authority at the present time to interfere with the operation of the ice house in the manufacture of ice for purposes of sale.

**LOSS OF RIGHT TO NON-CONFORMING USE—TEMPORARY
CHANGE OR VACANCY**

(No. 7349—Alderman—W. L. S.—December 7, 1931—6½ pp.)

Premises that are designed for a store and that are located in an apartment district do not lose their right for use as a store merely because they happen to be vacant at the time of the passage of the zoning ordinance.

Nor is the above right lost just because the store premises may have been temporarily used for living quarters after the zoning ordinance took effect, where no structural changes were made and where there was no intention of the owner to abandon the use of the premises for store purposes.

Citations:

- | | |
|------------|--|
| Statute: | Zoning act, sec. 14. |
| Ordinance: | Zoning ord., sec. 14 (H). |
| Cases: | Haller Baking Co.'s Appeal, 295 Pa. 257 (1929).
People v. Leo, 178 N. Y. S. 851 (1919). |

OPINION OF FOREGOING SYNOPSIS

This will acknowledge the receipt of your letter enclosing original plans of the two-story and basement apartment building, photograph of the premises and an affidavit of the owner. You request the views of this department as to whether the basement portion of the premises may, under the provisions of the zoning ordinance, be used at the present time for a candy store.

It appears that this building was erected in 1916. The plans which bear the stamp of approval of the Department of Health and Department of Buildings show the building to be a two-story and basement structure containing apartments, and on the plans for the basement portion of the building there appears a "store" 32' 8" x 14' 2" with four plate glass store windows 3' x 4' 9" each, a store door containing plate glass and cement steps leading down to the store door from the sidewalk on two sides with an iron rail fence along the sidewalk the entire width of the store.

After the erection of the building, it further appears, the basement store in question was used as a grocery store until about August, 1922. It was vacant thereafter until about August, 1923, when the present owner acquired the property. She states that at the time she purchased the property she intended to conduct the store herself, but that she found she was not then in a position to do so and she lived in it for about three months when she moved into one of the flats upstairs; that she thereafter endeavored to rent the premises for a store but as she was unable to get a tenant for that purpose she rented the store to two different families without any leases who used it for living quarters for about ninety days altogether. Then for a long time the store remained without a tenant until in 1930, she rented it for a candy store and it is being so used at the present time. No structural changes have ever been made in said basement store and it remains now as it was when the building was erected according to the original plans in 1916, and the owner states she never abandoned her intention of using it for a store.

As the said premises are in an apartment district, they may not be used

for a store unless they fall within the exception of the zoning ordinance having application to non-conforming uses.

A non-conforming use is defined by the zoning ordinance as "a use which does not comply with the regulations of the use district in which it is situated," and provision was made in the zoning ordinance for the continuance of non-conforming uses in accordance with the mandate of the State Zoning Enabling statute which provided that, "The powers by this act given shall not be exercised to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted."

Section 14 of the zoning ordinance provides that a non-conforming use existing at the time of the passage of the ordinance may be continued, but if changed to a conforming use, it may not thereafter be changed back to a non-conforming use.

There seems to be no doubt that the premises were originally designed and used for a store, but they were vacant when the zoning ordinance was enacted on April 5, 1923, and were afterwards used temporarily for living quarters, though, it is stated, without any structural changes having been made and without any intention on the part of the owner to abandon their use for store purposes.

The two questions then that arise are, (1) would the fact that the store was vacant on April 5, 1923, the date of the passage of the zoning ordinance, take away the right of the owner to use it now as a store; or (2) would the fact that after the passage of the zoning ordinance the store was used temporarily for living quarters change it into a conforming use so as to prevent the owner from now using it for a store which would be a non-conforming use.

In the case of Haller Baking Company's Appeal, 295 Pa. 256, a building was erected in 1915 containing a stable with twenty-five stalls. Under the zoning ordinance of the City of Pittsburgh of July 15, 1927, the stable building was placed in a residence district in which a stable with capacity for not more than four animals was permitted but in which a major stable having capacity for more than four animals was forbidden. There had been no substantial use of the premises as a stable since 1925 and when the appellant in that case, who purchased the property in August, 1927, sought to use it for a major stable, he was denied permission to do so by the city authorities. The lower court sustained the city authorities in refusing to permit the use of the property as a major stable and found that there was no real substantial use nor regularity of use sufficient to characterize it as an existing use as it sheltered in a few instances only a team or a horse. But the Supreme Court of Pennsylvania reversed the lower court and in directing that the owner of the premises be permitted to use them for a major stable said in part as follows:

"The use for which the property is adapted need not be in actual operation at the time of the adoption of the ordinance, if the attending circumstances connected with the property bear out the conclusion that the owner intended to use the property for that purpose. Thus, where an owner temporarily fails to have a tenant in his storeroom the day such ordinance is passed, though his tenant has left but a short time before, and he is expecting or endeavoring to procure a new one, such circumstance would not deprive him, under the zoning ordinance, of the right to continue the use of the property for which it was adapted merely because at the date of the ordinance it is not in *actual use*, although it is in potential use. It had use before, intent to continue, and an effort made to effectuate the purpose. Where a property is built for or adapted to a particular use, the question of existing use is determined by ascertaining as near as possible the intention of the owner, in connection with

the fact of a discontinuance or apparent abandonment of use; it is not to be determined on the basis of actual or substantial use on the date of adoption of the ordinance."

When we apply the decision of that case to the situation before us, the conclusion is unescapable that the fact that the store was vacant on April 5, 1923, the date of the passage of the zoning ordinance, would not prevent the owner from thereafter using it as a store.

Would the fact that after the passage of the zoning ordinance the store, without any structural changes, was temporarily used for living quarters, operate to prevent the owner from again using it for a store as our zoning ordinance provides in Paragraph H of Section 14, as follows:

"A non-conforming use if it changed to a conforming use shall not thereafter be changed back to any non-conforming use."

Again we have the zoning case of *Wohl v. Leo*, 178 N. Y. Supp. 851, wherein a party had constructed in 1915 a two-story building designed for a dyeing and cleaning establishment. The top floor thereafter was partitioned off with light plaster board partitions to make dwelling rooms. The owner lived in those rooms, using the first floor only for business purposes. This was the situation in 1916 when the New York zoning ordinance took effect which placed the said premises in a residence district. In March, 1919, three years later, the owner having acquired an adjoining house in which to live filed an application asking to be permitted to use the second floor for business purposes also. This application was refused by the city authorities but the court reversed their action and said:

"* * * The meaning of the word 'use' is not confined to describing the act of using, but may also be employed to describe the property of a thing which renders it suitable for a purpose. It seems to me that it is in this latter meaning that the word 'use' is employed in Section 6 of the (zoning) resolution. The use of a building designed and constructed for business is for business, and its use for business exists where the plan of the building is not structurally changed, although it may be actually occupied as a dwelling. In such a case the building remains available for business, notwithstanding its temporary use for a purpose for which it was not designed."

From the above it follows that premises in an apartment district designed for a store do not lose their right for use as a store because they happen to have been vacant at the time the zoning ordinance took effect. Neither is that right lost because such business premises may have been used temporarily after the zoning ordinance took effect, where no structural changes were made, for a use for which they were not designed and where it was not the intention of the owner to abandon the use of the premises for store purposes.

It is our opinion that the owner of the property is legally entitled in so far as the zoning ordinance is concerned to use the basement premises herein referred to for a candy store.

LOSS OF RIGHT TO NON-CONFORMING USE—NON-USE

(No. 7527—Alderman—W. L. S.—April 6, 1932—4 pp.)

Where the use of certain premises as a laundry existed at the time of the passage of the zoning ordinance, the owner has a vested right

to continue the use of the property for that purpose. The owner can lose that right only by tearing down the building or by voluntarily changing the use to a more restricted one. The fact that the building became unoccupied or was temporarily used for another purpose, there being no intent to abandon the use as a laundry, would not destroy the right.

A laundry is a C-1 use.

Citations:

- Cases: Haller Baking Co's. Appeal, 295 Pa. St. 257 (1929).
State v. Manders, 238 N. W. 835 (Mich., 1931).
People v. Leo, 178 N. Y. S. 851 (1919).

FORFEITURE OF RIGHT OF NON-CONFORMING USE BY LACK OF LICENSE

(No. 8290—*Deputy, Acting for the Mayor, Department of Buildings—M. H. F.—January 31, 1934—3½ pp.*)

The failure of a junk yard operator to procure the license required by ordinance or to pay an annual license fee would not work a forfeiture of the owner's right to continue a non-conforming use under the zoning ordinance, but it would subject the operator to the penalties provided in the licensing ordinance.

Citations:

- Statutes: SH '33, 24: 66-70.
Ordinances: Code '31: 1859-92.

CHANGE TO LOWER NON-CONFORMING USE

(No. 8699—*Division Fire Marshal in Charge of Fire Prevention—W. L. S.—March 12, 1935—2 pp.*)

A non-conforming C-1 use in existence on premises in an apartment district prior to the passage of the zoning ordinance may be changed to another non-conforming C-1 use, but may not be changed to a C-3 use.

CONTINUATION OF A NON-CONFORMING USE OR HIGHER NON-CONFORMING USE

(No. 8787—*Deputy, Acting for Mayor, Department of Buildings—W. L. S.—June 5, 1935—1 p.*)

If premises employed for a non-conforming C-3 use were not subsequently occupied by a higher use, they may now be occupied by a C-3 use or any higher use.

EXTENSION OF NON-CONFORMING USE—FENCING PRIVATE PROPERTY

(No. 8370—Mayor—W. L. S.—April 19, 1934—2½ pp.)

Where a coal yard was established before the passage of the zoning ordinance, it may be continued, although it is a manufacturing use in a district zoned for commercial use. But it may not be enlarged or extended upon any adjacent property which is zoned for commercial or apartment purposes.

There is nothing to prohibit an owner of private property from placing a fence upon it, so long as the fence complies with the ordinances of the city.

RECOMMENDATION FOR NON-CONFORMING USE BY BOARD OF APPEALS*

(No. 7909—W. L. S.—January 20, 1933—2 pp.)

While the Board of Appeals is authorized to recommend that the City Council permit premises in an apartment district to be operated as a non-conforming commercial use in a block, or in a block directly across the street from a block in which there already exists a similar non-conforming use, that variation may not be recommended unless a non-conforming use existed at the time of the passage of the zoning ordinance on either side of the street.

RECEIVERSHIP PROPERTY USED IN VIOLATION OF ZONING ORDINANCE

(No. 7552—Deputy, Acting for the Mayor, Department of Buildings—W. L. S.—April 19, 1932—3 pp.)

Suit or proceedings against a receiver appointed by a court of Illinois may be begun without the consent of the court that appointed him, if these proceedings relate to some transaction or act which he has done while engaged in carrying on the business connected with the property.

Where property is used in violation of the use district provisions of the zoning ordinance, and such use is commenced after the appointment of a receiver and carried on with his consent, the Department of Buildings should first serve notice upon the receiver and the tenant to abate the violation, and then, if it is not immediately complied with, request the law department to institute proceedings.

*See opinions, pp. 565, 566, on zoning variations.

*(5) Frontage Consents***NEW FRONTAGE CONSENTS DUE TO TEMPORARY VACANCY
—GASOLINE TANKS**

*(No. 8515—Division Marshal in Charge of Fire Prevention—W. L. S.
—October 1, 1934—2½ pp.)*

When frontage consents had been obtained to install gasoline tanks on certain property and such property after a period of operation as a filling station is temporarily devoid of a tenant, it is not necessary to secure new frontage consents to renew operations as a filling station on such property even though the owner of the gas tanks removes them from the property, unless the property owner uses the premises for a different use in the interim or has indicated an intent to abandon the premises for filling station purposes.

Citations:

Case: *Chicago v. Stratton*, 162 Ill. 494 (1896).

Other reference: Op. Corp. Counsel (1916-19), p. 642.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge the receipt of your letter of September 17 requesting the views of this department.

As we understand it, the facts as shown by your letter as well as from a conference with the owner of the property involved, are substantially as follows:

On October 11, 1927, the owner of the property filed an application with your bureau to install tanks to be used in connection with a gasoline filling station. He filed at that time, pursuant to the ordinances of the City of Chicago, frontage consents for the installation of such tanks on said premises. These consents were duly checked by the Bureau of Maps, and the latter bureau advised you on October 21, 1927, that the consents filed were adequate.

October 21, 1927, the application to install the tanks was approved by Chief of the Bureau of Fire Prevention. Thereafter permit was duly issued and the tanks were installed. A building was moved from another part of the premises to be used thereafter in connection with the gasoline filling station. The owner leased the filling station to a certain lessee who operated the station for two years. He then leased it to another lessee who operated the station until fourteen months ago, when said lessee moved across the street and operates a filling station there now. However, the Standard Oil Company at all times owned the tanks and about five months ago it removed the tanks from the premises. The owner of the property now has a new tenant for the gasoline filling station, and you wish to be advised whether you would be justified at this time in issuing a new permit for the installation of tanks to again operate the filling station at this location. The owner states that since the original consents were obtained in 1927 the property was never used for any other purpose than that of a gasoline filling station; that the use of the premises for such a station was never abandoned by him; that it would be manifestly unfair to him as the owner of the property to refuse him permission to install new tanks and continue to use his property

for a gasoline filling station merely because he was unfortunate enough to lose his last tenant as he has been holding the property vacant in the meantime searching for a new tenant.

Under the city ordinances it is unlawful to install tanks for a gasoline filling station without obtaining certain frontage consents. The purpose of obtaining frontage consents is to enable adjacent property owners "to waive the right to insist upon the enforcement of a legal prohibition which was adopted for their benefit and comfort." *City of Chicago v. Stratton*, 162 Ill. 494.

This department has heretofore held concerning a set of facts substantially analogous to those now under consideration that where frontage consents are once obtained to operate a public garage, no further frontage consents are required when a new license is applied for to operate such garage, the opinion stating that the ordinances "require only an initial petition for frontage consents for the continued operation of a garage at a given location." The opinion further stated that "the consent once obtained fixes the character of the property and the continuation of the use does not add any additional burden. The consent given was for the operation of a garage, it being the character of the business that is regulated and not the person conducting it." *Opinions of Corporation Counsel*, April 30, 1918.

We feel that the original frontage consents furnished by the owner in 1927 inure to the owner's benefit and for the use of any tenant operating the premises as a filling station and not merely to the benefit of the first or second tenant to whom the owner sees fit to rent the premises. The operation upon the premises of a gasoline filling station after proper frontage consents were filed impresses the property with that character of use and the mere fact that it chances at some time in the future to be temporarily vacant and devoid of a tenant does not operate to nullify the efficacy of the original frontage consents and to deprive the owner of the right to again use it as a gasoline filling station, even though the tanks may have been removed by the Standard Oil Company which owns them, so long as the premises were not used in the meantime for another and different purpose after the tanks were removed. Moreover, we feel that the mere removal of the tanks, the owner of the tanks not being the owner of the property on which the tanks were installed, cannot reasonably be construed as constituting an abandonment of the filling station use. The building itself used in connection with the filling station is still there and is probably even of more importance in connection with the use than any portable tanks installed in connection therewith.

To hold otherwise would, as a general rule, lead to absurd results. It would mean that every time a new tenant took possession of a garage new frontage consents would have to be obtained, notwithstanding the fact that the owner of the garage had initially filed frontage consents; that every time a new tenant sought to occupy an undertaking establishment or a junk shop, new frontage consents would have to be obtained, even though the owners of the properties had duly filed initial frontage consents.

It is, therefore, our opinion, as we understand the situation, that you are justified at this time in issuing a permit for the installation of tanks so that the owner of the property may continue to have the property used for a gasoline filling station.

**EFFECT OF OWNERSHIP CHANGE ON FRONTAGE CONSENTS—
GAS STATION***

(No. 7581—*Division Marshal—Fire Prevention—W. L. S.—May 19, 1932—3 pp.*)

When the necessary frontage consents for installing tanks in a gasoline station have been duly filed with the Fire Department, the tanks installed, and the operation of the filling station legally commenced, the business may be continued without obtaining new frontage consents, despite changes in the leasing or ownership of the property so long as there is no lapse in the operation of the premises as a filling station.

Citations:

Case: *Chicago v. Stratton*, 162 Ill. 494 (1896).

Other reference: *Op. Corp. Counsel* (1911-12), p. 809.
Id. (1923-24), p. 624.

**FRONTAGE CONSENTS FOR PURCHASER OF UNDERTAKING
ESTABLISHMENT†**

(No. 6771—*F. J. C.—September 24, 1930—4½ pp.*)

A purchaser of an undertaking business who intends to continue the same general class of business need not procure any new or additional frontage consents when the seller has obtained the requisite frontage consents to conduct an undertaking business on the premises.

Citations:

Ordinances: Code '22: 931, 1902.

Other reference: *Op. Corp. Counsel* (1911-12), p. 310.

FRONTAGE CONSENTS FOR CORNER LOT

(No. 7438—*President, Board of Health—W. L. S.—February 3, 1932—2½ pp.*)

When a business for which frontage consents are required is to be located on a corner lot, both streets on which the lot immediately adjoins must be considered.

Citation:

Ordinance: Code '31: 3797.

*See also opinions on p. 584.

†See also Opinion No. 8680, p. 587.

EVADING FRONTAGE CONSENTS BY LAND CONVEYANCE

(No. 6687—C. J. A.—May 29, 1930—5 pp.)

The necessity for obtaining frontage consents is not removed when a person seeks to make it appear, by conveying a narrow strip of land under conditions which do not give a substantial interest, that a hospital built on the remainder of the property will not front on a residential street.

Citation:

Other reference: 15 Op. Corp. Counsel 126.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of the 26th inst. requesting the Corporation Counsel to reconsider his opinion of April 4, 1930, holding that a hospital cannot legally be built and operated at North Hoyne avenue without first obtaining frontage consents from the property owners on Pierce avenue. We note that you say:

"The substance of the opinion given by your office is that we have no right to operate a hospital on the grounds that the conveyance of the Pierce avenue frontage is a subterfuge. There are no facts or circumstances connected with this proposed hospital that warrants this construction. Since the hospital property does not abut on Pierce avenue and the further fact that the parcel separating the hospital property and this street is owned by another party not connected with the hospital, we fail to see why we should be burdened with the duty of getting frontage consent on Pierce avenue."

As you do not question the specific facts stated in our opinion, but merely the conclusions we drew from the same, we assume that the facts therein stated are substantially correct. We there stated that from the files submitted to us, it appeared that your corporation had applied to the building department for a building permit, which permit was refused; that the corporation then appealed to the Zoning Board of Appeals; that the latter body ruled that it could only pass upon the size and form of the building and not upon the *use* which might afterwards be made of the same, and accordingly ordered a permit to issue for the construction of a building to be set back, however, 8 feet north of the lot line on Pierce avenue. Clearly, however, this ruling constituted neither an express nor an applied authorization by the city to operate a hospital on the premises. For that, a permit must first be obtained from the health department and the same can be issued only when the provisions of the ordinance relative to frontage consents have been complied with.

We also stated in our opinion that we understood the facts to be that originally the hospital corporation owned the entire frontage on Pierce avenue as well as that on Hoyne avenue, and that its original building plans contemplated the construction of the building up to the lot line along Pierce avenue with one entrance on that street; that after the property owners on Pierce avenue had manifested considerable opposition to the construction of the hospital, the corporation, by its deed, conveyed to one a strip of ground 3 feet wide along Pierce avenue with the following reservation, however:

"Subject to a right of way over any and all parts or part of the above described premises, together with an unobstructed right to use such premises for such time and in any manner necessary to facilitate any con-

struction of building or buildings on the North Twenty-two (22) feet of said Lot Fourteen (14) above and adjoining lots belonging to the grantors; the above rights are expressly reserved to the grantors, its grantees, assigns, transferees and successors for a period of ten (10) years from the date of this instrument."

In view of the above facts which you do not seem to dispute, we can see no reason for modifying our opinion. The conveyance of merely 3 feet along the street line of Pierce avenue, when under the permit granted, the company could not build any closer than 8 feet from the lot line anyway did not give the grantee any substantial interest in the premises, especially when the grantor (the Hospital Corporation) reserved the right of way over the premises and a right to use the same. A conveyance of such a narrow strip under such circumstances with a reservation in the grantor to still continue and use the same is in our opinion a mere subterfuge and attempt to evade the ordinance by a mere technical device or quibble to which this department will not consent to be a party. In our opinion, the hospital would still to all intents and purposes be fronting on Pierce avenue and we believe that the courts would so hold.

* * * * *

FRONTAGE ON RESIDENTIAL AND COMMERCIAL STREETS— MISREPRESENTATION OF FRONTAGE—REVOKING UNDERTAKER'S LICENSE

(No. 6657—Commissioner of Health—F. J. C.—April 30, 1930—5 pp.)

An undertaking establishment which is not on a corner lot, and which fronts on both commercial and residential streets is within the ordinance requiring frontage consents.

The obtaining of a permit for the installation of a morgue under the pretense that the establishment fronts only on a commercial street is a subterfuge that justifies the revocation of the undertaker's license by the Mayor.

Citation:

Ordinance: Zoning ord., sec. 33.

CHECKING FRONTAGE CONSENTS—OWNERSHIP CHANGE IN FRONTAGE CONSENTS AREA—GAS STATION*

*(No. 8139—Division Marshal in Charge of Fire Prevention—M. H. F.
—August 5, 1933—4½ pp.)*

An application to install any tanks for a gas station must be accompanied by a plat or survey of the property within the frontage area and the requisite frontage consents.

If, in checking frontage consents, it is discovered that there have been changes in the ownership of property in the frontage area, front-

*See also p. 584 on frontage consents for gasoline filling stations.

age consents of the present owners should be obtained before a permit to install tanks for a gas station is granted.

The fees of ten dollars for a tank permit and twenty-five dollars for checking the frontage consents of new gas station should be paid before any action is taken upon the applications for the same.

In determining the sufficiency of frontage consents for an expansion of a gasoline filling station, the applicant's consents for the property now used as a filling station should be disregarded but his frontage consents for other property owned by him in the frontage area may be counted.

Citation:

Ordinance: Code '31: 2670.

VARIATION OF NAME ON FRONTAGE CONSENT PETITION

(No. 8079—*Commissioner of Public Works—G. J. T.—May 29, 1933—2½ pp.*)

When a name which appears upon a frontage consent petition shows a material variance from what is alleged to be the name of the individual upon a document of record, the petition may be rejected until the signature of record is supplied.

BOUNDARY "BLOCKS" FOR FRONTAGE CONSENTS— HOSPITALS.

(No. 8493—*President, Board of Health—B. J. K.—August 21, 1934—2 pp.*)

The streets which run into but do not cross the street upon which it is proposed to locate a hospital and which are nearest in either direction from the proposed hospital are to be considered the ones bounding the "block" in which frontage consents must be obtained.

Citation:

Ordinance: Code '31: 1677.

REVOCATION OF FRONTAGE CONSENTS*

(No. 6526—*Chief of Fire Prevention—F. J. C.—October 16, 1929—3½ pp.*)

Frontage consents may be revoked at any time prior to the issuance of a permit, but in the absence of fraud in the obtaining of the

*See also Opinion No. 8075, p. 381, on revocation of frontage consents.

signatures, they cannot be revoked after the issuance of the building permit.

Citation:

Case: *Theurer v. People*, 211 Ill. 296, 303 (1904).

**WITHDRAWAL OF FRONTAGE CONSENTS FOR PERMITS—
QUESTION OF FORGED CONSENTS**

(No. 6627—*Division Marshal in Charge of Fire Prevention—F. J. C.—
March 25, 1930—3½ pp.*)

Persons signing frontage consents to allow the issuance of a permit may withdraw their consents up to the time of the issuance of the permit.

When a permit requiring frontage consents has been issued and certain signers of the frontage consents declare their signatures to have been forged, the question presented is one of private rights as between those signers and the persons to whom the permit was issued, and should be decided by the courts.

Citations:

Cases: *Thuerer v. People*, 211 Ill. 296 (1904).
People v. Lueder, 287 Ill. 115 (1919).

Opinion No. 6436 of May 14, 1929, to the Commissioner of Health is in accord with the above opinion.

**APPROVAL OF LICENSE WHEN INSUFFICIENT FRONTAGE
CONSENTS—GAS STATION***

(No. 7589—*Division Marshal—Fire Prevention—W. L. S.—May 31,
1932—9½ pp.*)

When the tanks of a gasoline station occupy a greater portion of a lot than for which frontage consents were filed, the application for a license for that filling station should not be approved until the necessary additional frontage consents are filed.

Citations:

Ordinance: Code '31: 3274.

Case: *Jennings v. Calumet National Bank*, 348 Ill. 108 (1932).

*See also opinions, p. 584, on frontage consents for gasoline filling stations.

REVOCATION OF PERMIT INVOLVING FRONTAGE CONSENTS

(No. 6545—*Division Marshal in Charge of Fire Prevention—F. J. C.—November 18, 1929—3 pp.*)

Persons who sign frontage consents may revoke them at any time prior to the date of the issuance of the permit.

The Division Marshal in charge of fire prevention is limited in his power to revoke a permit involving frontage consents to the record which has been presented prior to the time of the issuance of the permit.

RAILROAD AS FRONTAGE

(No. 6427—*Fire Commissioner—F. J. C.—May 3, 1929—3 pp.*)

A railroad is not to be considered as a boundary of a block, and the frontage occupied by a railroad in a street bounding a block must be considered as a part of the frontage necessary in determining the number of frontage consents that must be obtained for the establishment of a dry cleaning business.

Citation:

Ordinance: Code '22: 1416, par. (a), as amended, Coun. J. (1926-27), pp. 3610-12.

FRONTAGE CONSENT BY SCHOOL PROPERTY

(No. 6568—*Commissioner of Health—F. J. C.—December 14, 1929—3½ pp.*)

On frontage consent petitions when school property is concerned, the signature of the business manager of the Board of Education is proper and within the scope of his authority until his signature is questioned by affirmative evidence. This question in the first instance should be determined by the Board of Education.

Citations:

Statutes: Cah. '29, 122: 152-159.

Case: Theurer v. People, 211 Ill. 296, 300 (1904).

FRONTAGE CONSENTS FOR PUBLIC PLACES OF AMUSEMENT*

(No. 7803—*Commissioner of Police—W. V. D.—November 10, 1932—2 pp.*)

The only restriction on the location of a public place of amusement is the requirement of obtaining the written consent of a majority of the property owners according to frontage on both sides of the street

*See also opinions, pp. 500-503, on licensing amusements.

surrounding the block in which it is proposed to locate the public place of amusement, when two-thirds of buildings on both sides of the street are used exclusively for residence purposes.

Citations:

Ordinances: Code '31: 1893, 1910, 1915.

FRONTAGE CONSENTS FOR GASOLINE FILLING STATION*

(No. 8984—*L. V. R.*—December 20, 1935—1½ pp.)

The written consents of the property owners representing a majority of the frontage within 150 feet from the lot where gasoline tanks are to be installed is required before a filling station may be constructed.

A frontage consent may be withdrawn at any time before it is used, and may be used only for the purpose for which it is given.

Citation:

Ordinance: Code '31: 3274.

LAWFUL SITE AND FRONTAGE CONSENTS FOR GASOLINE STATION*

(No. 7809—*Division Marshal in Charge of Fire Prevention*—*W. L. S.*—November 14, 1932—20½ pp.)

To determine what is a lot or plot of ground for which frontage consents must be obtained to install tanks for a gasoline filling station the Division Marshal in charge of fire prevention should require frontage consents for the area from the boundaries of all the land used for the tanks and include any driveways and enclosing fences.

Any lot or plot of ground in the city is a lawful site for a gasoline filling station, provided that the use is not prohibited by the Zoning ordinance, that the lot or plot of ground is not used for a school, hospital, church or theater, that frontage consents are properly obtained, and that the plot of ground used for filling station purposes is not less than twenty feet wide and not less than fifty feet long.

Citations:

Ordinances: Code '22: 2279.

Code '31: 2670, 3274.

Cases: City of Rockford v. Schulz, 296 Ill. 254 (1921).

Jennings v. Calumet National Bank, 348 Ill. 108 (1932).

Other references: 38 CJ 283.

Webster's International Dictionary, "plot."

Frontage Consents, Gas Tanks: In section 2279 of the Code of 1922 requiring frontage consents for the installation of gasoline tanks in any plat

*See also opinions on pp. 525, 526, on licensing gasoline filling stations and opinions, pp. 576-578, which deal with frontage consents for gasoline filling stations.

of ground and prohibiting such installation within certain distances of schools, churches, hospitals, and the like, the term "plat" from which measurements are to be taken does not mean that portion of the lot which the installers designate in their application as constituting the immediate repository for the tank, especially where its contents are to be used for business on the remainder of the lot, nor does such construction make the ordinance unreasonable or discriminatory as against the owners or users of a large lot in which such tank is installed.—*Jennings v. Calumet National Bank*, 348 Ill. 108 (1932).

FRONTAGE CONSENTS FOR HOSPITAL IN COMMERCIAL DISTRICT*

(No. 6678—*Commissioner of Health—F. J. C.—May 23, 1930—6 pp.*)

Frontage consents are not necessary to permit the erection of a hospital which is to face on a commercial street and to be forty feet from the intersection of the commercial street with a residential street, where no interest in the intervening property is contemplated by the persons erecting the hospital.

As an apartment use is more restricted than a commercial use, a hospital, being included in an apartment district use, may be established in a commercial district.

Citations:

Ordinances: Code '22: 479, 930, 1862.
Zoning ord., sec. 6.

HOSPITAL FACING STREET ZONED FOR FRONTAGE CONSENTS*

(No. 6632—*Commissioner of Health—M. H. F.—April 4, 1930—7 pp.*)

A permit for the erection of a hospital, which may be held to "face" if not strictly to "extend" to a street zoned so as to necessitate the obtaining of frontage consents, should not be issued until the frontage consents have been obtained.

Citations:

Ordinances: Code '22: 479, 930, 1362.

FRONTAGE CONSENTS FOR STATE-LICENSED INSTITUTIONS

(No. 6634—*Commissioner of Health—C. J. A.—April 10, 1930—7½ pp.*)

A home for the care of children which has been accredited, certified, or licensed by the state cannot be required by the city to obtain a license or frontage consents to locate in a block where two-thirds or more of the buildings fronting on both sides of the street are used exclusively for residence purposes.

The ordinance which requires frontage consents for a home to be

*See also Opinion No. 7866, p. 527, on licensing hospitals.

established in a block where two-thirds or more of the buildings fronting on both sides of the street are used exclusively for residence purposes applies only to a home which must be licensed by the city, or must obtain a building or some other kind of permit from the city.

The City Council may require frontage consents only as an advisory expression of opinion from residents of the city preliminary to some act by the city.

There is no legal basis for requiring frontage consents for the operation of a business or institution when the city does not contemplate any legislative or administrative act.

Citations:

Ordinances: Code '22: 1874, 1881.

Case: Morton v. Holes, 17 N. D. 154, 115 N. W. 256 (1908).

FRONTAGE CONSENTS FOR NURSING HOME

(No. 8769—President, Board of Health—W. L. S.—May 15, 1935—4 pp.)

Frontage consents are not needed for the establishment of a nursing home when less than two-thirds of the buildings on both sides of the street on which the home is to front, are used exclusively for residential purposes.

A nursing home can be established in a district zoned for commercial use.

Citations:

Ordinance: Code '31: 2324.

Other reference: Opinion No. 8750 (this page).

FRONTAGE CONSENTS FOR NURSING HOME IN RESIDENTIAL BLOCK

(No. 8750—President, Board of Health—W. L. S.—April 21, 1935—3 pp.)

A nursing home must obtain frontage consents to locate in a block where two-thirds of the buildings fronting on both sides of the street are devoted exclusively to residential purposes.

Citations:

Ordinances: Code '31: 1677, 2324.

FRONTAGE CONSENTS FOR LAYING STREET CAR TRACKS.

(No. 8762—Alderman, 45th Ward—J. J. D.—May 6, 1935—1 p.)

Street car tracks cannot be laid on North Damen avenue between Clybourn and Belmont, and between Roscoe and Irving Park streets, without first obtaining frontage consents from the owners of property abutting the proposed route.

**FRONTAGE CONSENTS FOR UNDERTAKING ESTABLISHMENTS
ON THROUGH STREETS AND CAR LINE STREETS**

(No. 8680—President, Board of Health—M. H. F.—February 23, 1935—5½ pp.)

Frontage consents are not required in order to establish a morgue or undertaking business on a through street or a state highway not designated as a boulevard or pleasure driveway in the city, provided all other provisions of the City Code are obeyed.

The provisions of the undertaking ordinance referring to streets "in which street cars are operated" does not include streets on which motor buses, not street cars, operate.

Citations:

Statutes: SH '33, 24: 531.

Id., 121: 292.

Ordinances: Code '31: 1970, 3797.

Uniform Traffic code, art. I, sec. 1.

Case: Bradley v. Degnon Contracting Co., 224 N. Y. 60, 120 N. E. 89 (1918).

**FRONTAGE CONSENTS FOR STADIUM IN COMMERCIAL
DISTRICT**

(No. 6494—Commissioner of Buildings—R. N.—August 17, 1929—2½ pp.)

Frontage consents are not necessary for the issuance of a permit to build an arena or stadium, if the site selected is on frontage zoned for commercial purposes.

Citation:

Ordinance: Code '22: 190.

REPEAL OF FRONTAGE CONSENT ORDINANCE OF NOVEMBER 30, 1921

(No. 6585—S. A. E.—January 15, 1930—1½ pp.)

The ordinance of November 30, 1921, setting forth certain requirements concerning frontage consents for the construction of buildings in residential districts, was repealed by passage of the zoning ordinance of May 23, 1923.

Citations:

Ordinances: Coun. J. (1921-22), p. 1357 (Frontage consents in residential districts).
Coun. J. (1923-24), p. 245 (Zoning ord.).

B. SPECIFIC ZONING RESTRICTIONS

(1) Residential Districts

MINIATURE GOLF COURSES IN RESIDENTIAL DISTRICT*

(No. 6763—Acting Commissioner of Police—F. J. C. and J. N. K.—September 4, 1930—4 pp.)

Miniature golf courses may be established in residence districts in accordance with the zoning ordinance as they are of a use similar to golf grounds. Police jurisdiction, for purposes of preserving peace and performing ordinary police functions, extends to miniature golf courses after they are in operation.

Citations:

Ordinance: Zoning ord., sec. 4.
Case: Condon v. Village of Forest Park, 278 Ill. 218. (1917).

COMMUNITY GARAGE IN RESIDENTIAL DISTRICT— FRONTAGE CONSENTS

(No. 6932—Commissioner of Buildings—L. H.—June 5, 1931—5 pp.)

A community garage cannot be constructed in a residential district on a lot which is not owned by the owners of the apartment building in connection with which the garage is constructed.

Even if a community garage should be constructed on the same lot occupied by an apartment building in connection with which it is constructed, if such garage houses more than five cars, frontage consents would be necessary.

*See also Opinion No. 6764, p. 558.

PRIVATE SCHOOLS AND ATHLETIC FIELDS IN RESIDENTIAL DISTRICT

(No. 8475—*Deputy Acting for Mayor, Department of Buildings—W. L. S.—July 17, 1934—4 pp.*)

A private boarding and day school is in general a use permitted in a district zoned for residences.

An athletic field is an auxiliary use in connection with a private school which is permitted in a residence district and there is no prohibition against charging admission fees to such athletic field.

Citation:

Ordinance: Zoning ord., secs. 4, 7.

LOCATION OF GOLF GROUNDS WITH LUNCHROOM

(No. 6694—*F. J. C.—June 11, 1930—4 pp.*)

A golf ground with a lunchroom on it may be located in a residence district where the restrictions are less than an R-1 use, and may be also located in an apartment, commercial, or manufacturing district.

Citation:

Ordinance: Zoning ord., secs. 4 (par. A), 14 (par. M, L).

(2) *Apartment Districts*

CLUBS IN RESIDENTIAL AND APARTMENT DISTRICTS

(No. 7735—*Commissioner of Police—W. L. S.—August 29, 1932—4 pp.*)

A private club may be maintained in an apartment district if it is operated for the benefit of its members and its chief activity is not a service customarily carried on as a business.

Unless certain premises in a residential district had been used for club purposes on and before April 5, 1923, they may not now be so used until a certificate of occupancy that the proposed use conforms to the provisions of the zoning ordinance is first obtained from the Commissioner of Buildings.

Citations:

Ordinance: Zoning ord., secs. 6, 7, 8, 26.

Other reference: Webster, Dictionary, "club."

INSTALLATION OF MACHINERY AND APPARATUS IN APARTMENT DISTRICT

(No. 6818—C. J. A.—December 23, 1930—3 pp.)

The zoning ordinance is not violated by the installation of machinery and apparatus in an apartment district when these articles are intended for private use and experimentation and not for any present commercial purpose, provided the operation of them does not disturb the residents of the neighborhood.

Citation:

Ordinance: Zoning ord., sec. 7.

STORES IN APARTMENT DISTRICTS

(No. 8599—Mayor—W. L. S.—December 24, 1934—2 pp.)

No store may be located in an apartment district except as it is required for the operation of the apartment building or the use of its tenants. Such store must be conducted and entered only from within the building and may have no street window, exterior display or other exterior sign to advertise such use.

Citation:

Ordinance: Zoning ord., sec. 8.

DELICATESSEN STORES AND RESTAURANTS IN APARTMENT AND COMMERCIAL DISTRICTS

(No. 8570—W. L. S.—November 22, 1934—1 p.)

In an apartment district, restaurants and delicatessen stores are prohibited except as auxiliary uses in connection with the operation of hotels or apartment houses when conducted and entered only from within the building, and with no street window, exterior display or exterior sign used to advertise it.

Restaurants and delicatessen stores are permitted in a commercial district.

GOLF PRACTICE COURSE IN APARTMENT DISTRICT

(No. 8514—Committee on Building Zoning—W. L. S.—October 1, 1934—2 pp.)

A "Stop and Sock" golf practice course may be operated in an apartment district.

Citation:

Ordinance: Zoning ord., sec. 4.

FRATERNITY HOUSE IN APARTMENT DISTRICT

(No. 8197—Alderman, 4th Ward—W. L. S.—October 24, 1933—1 p.)

A fraternity house in an apartment district is not a violation of the zoning ordinance.

HOME FOR AGED IN APARTMENT DISTRICT

(No. 7427—President, Board of Health—W. L. S.—January 20, 1932—4½ pp.)

A private home for the aged may be located in an apartment district.

Citations:

Case: Washington v. Roberge, 144 Wash. 74, reversed 278 U. S. 116 (1928).

Other reference: Bouvier's Law Dictionary (Rawle's 3rd ed.), "hospital."

VARIATIONS FOR NON-CONFORMING USE—RETAIL FOOD STORE IN APARTMENT DISTRICT*

(No. 7504—Mayor—W. L. S.—March 22, 1932—4 pp.)

The Board of Appeals is prohibited from recommending a variation that will permit the operation of a store in a block where no stores, or similar use existed on either side of the street at the time of the passage of the zoning ordinance.

A retail food store cannot be operated in an apartment district.

Citation:

Ordinance: Zoning ord., sec. 28.

FACTORY IN APARTMENT DISTRICT

(No. 8438—Illinois Commerce Commission—W. L. S.—June 16, 1934—1 p.)

A factory may not be operated in an apartment district unless as a non-conforming use which was in existence at the time the zoning ordinance was passed.

The Commissioner of Buildings is the enforcing officer of the zoning ordinance.

*See also Opinion No. 7909, p. 575.

FACTORY IN APARTMENT DISTRICT*

(No. 6966—*Commissioner of Public Works*—W. L. S.—June 22, 1931—2 pp.)

To erect a factory in an apartment district, an amendment of the zoning ordinance would have to be made by the City Council after public notice and a public hearing by the City Council Committee on Buildings and Zoning on such amendment.

Citation:

Case: *Welton v. Hamilton*, 344 Ill. 82 (1931).

(3) Commercial and Manufacturing Districts**USE OF BUILDING LOCATED MAINLY IN COMMERCIAL DISTRICT**

(No. 7267—*Commissioner of Buildings*—W. L. S.—November 6, 1931—5 pp.)

A building which is so located that four-fifths of its area is in a commercial district, and in which there is no physical separation between the part in the commercial district and the one-fifth which is in an apartment district, may be used as though it were entirely in a commercial district.

Citations:

Ordinance: Zoning ord., sec. 23.

Cases: *Fauss v. McConnell*, 157 S. E. 625 (Ga., 1931).
Nestow v. City of Cambridge, 277 U. S. 183 (1928).
Gilfillan's Permit, 291 Pa. St. 358 (1927).

USE OF BUILDING ZONED TWO-THIRDS IN COMMERCIAL USE DISTRICT

(No. 7228—*Chairman Board of Appeals*—W. L. S.—October 28, 1931—3 pp.)

Where two-thirds of a building having a frontage of thirty feet is zoned in a commercial use district, the courts would probably hold that the entire building could be used for commercial purposes.

Citation:

Ordinance: Zoning ord., sec. 23.

MARKETS IN COMMERCIAL DISTRICT

(No. 7182—*Alderman*—W. L. S.—October 9, 1931—2 pp.)

Where property is zoned for commercial use, the city may not prohibit the occupancy and use of such property as a market, provided

*See Opinion No. 7597, p. 562, on amending the zoning ordinance.

the occupants of the market have taken out licenses and are conducting their businesses in accordance with the ordinances of the city.

LOCATION OF DRY CLEANING ESTABLISHMENTS*

(No. 7143—Division Marshal in Charge of Fire Prevention—W. L. S.—September 23, 1931—1½ pp.)

A shop where clothes are received for cleaning and pressing and the cleaning is done mechanically with carbon tetrachloride is a C-3 use.

A C-3 use may be located in a commercial or manufacturing district, except that it may not be established in that part of a commercial district which is nearer at any point to a residence or apartment district than 125 feet.

Citation:

Ordinance: Zoning ord., sec. 8.

LOCATION OF PAINT AND VARNISH FACTORIES— REGULATION OF FENCE HEIGHT

(No. 6688—Alderman, 40th Ward—F. J. C.—May 29, 1930—8 pp.)

An ordinance prohibiting factories from manufacturing lacquers, varnishes and paints in a specified district would be invalid as it conflicts with a state law and is not general, covering all property similarly situated.

A state law prohibiting factories from manufacturing lacquers, varnishes, and paints in a specified district of the city would be retroactive as to factories already existing in the district, and could not be enforced against them.

The zoning ordinance prohibits paint and varnish manufacturing except in a district zoned for commercial and manufacturing purposes.

The height of fences is regulated by an ordinance and the Commissioner of Buildings has power to remove fences which violate the ordinance.

Citations:

Ordinances: Code '22: 918.

Zoning ord., secs. 8, 11.

Case: People v. Kaul, 302 Ill. 317 (1922).

*See Opinion No. 6492, p. 561, on restrictions on dry cleaning establishments.

CHAPTER IX

PUBLIC UTILITIES*

INTRODUCTORY

The utilities with which the city has extensive contact include a local gas company, a local electric company, a telephone company, over twenty-five steam railroads, three local transport lines and a tunnel company. The latter carries goods beneath street level in the commercial center of the city. That these are vital to the social well-being and industrial efficiency of the city is evident. For example the three major local transport lines in 1935 carried over 840 million revenue passengers while the Illinois Bell Telephone Company listed almost 850,000 telephone subscribers in that same year. The Chicago Tunnel Company in 1928, the latest year for which figures are available, handled over 600 thousand tons of merchandise.

The maintenance of satisfactory utility rates, service and safety for the public is a continuing concern of governmental authorities—national, state and local. The important place occupied by this subject in the operation of Chicago government is indicated by the fact that four of the committees of the City Council deal with some phase of the public utility problem.

The entire control over rates, service and safety of local public utilities, with the exception of certain powers over local transport delegated to the city in 1935, are vested in a state body, the Illinois Commerce Commission. This has been the situation since 1913 when a state enactment placed this control in the hands of the State Public Service Commission which later became the Illinois Commerce Commission. Excluding the above-mentioned exception, the city is powerless to regulate utilities and can only petition the Illinois Commerce Commission for action, a privilege reserved to any private individual. Nevertheless, by direct negotiation and cooperation with the utilities, by petitioning the Illinois Commerce Commission and litigating in the courts, the city has played an active and continuing role in public utility regulation. For example, the city recently completed eleven years of litigation in a telephone rate case involving a saving of about 18 million dollars to telephone customers.

The city also exercises the power of consent to the establishment of permanent structures in city streets. Through this power, the city

*For opinions dealing with the city's water system, see pp. 790-812.

grants franchises for the location of public utility structures in and upon streets. Thus the city can control the location of these lines and exact a compensation for the use of the streets. However, it cannot exercise police regulation requirements as a condition to be met before consent is granted. Neither does this power of consent apply to the public utility's right to continue to occupy streets but only to the original installation of utility structures in streets.

The most significant development of recent years has been the delegation of certain powers over local transport by a state act of 1935. This act gave the city exclusive control over the location, extension and equipment of local transportation lines. Prior thereto the companies had to obtain a certificate of public convenience and necessity from the Illinois Commerce Commission to operate on a certain route and a bus company was not even required to obtain municipal consent to the use of city streets.

Other outstanding developments of the last seven years include the granting of franchises to the Illinois Bell Telephone Company in 1931 and to the Chicago Tunnel Company in 1932. A consolidated traction ordinance was enacted in 1930 but was allowed to lapse in 1934 because the local transportation lines were unable to accomplish the required consolidation. A first step toward coordinating the surface, elevated railroads and bus lines was achieved in 1935-36 by the establishment of a transfer system between these local transportation companies through the initiative of the city.

The role of the city, the types of situation confronting it, and the powers it exercises in the sphere of public utility operations are effectively brought out in the opinions of this chapter.

A. RAILROADS

(1) *Powers of Illinois Commerce Commission*

REGULATION OF RAILROADS

(No. 6984—Alderman, 19th Ward—C. J. A.—July 3, 1931—6 pp.)

When the city has once given consent to the use of a street for railroad purposes, the Illinois Commerce Commission has the sole right to determine how the railroads may operate.

General supervision and control over all public utilities is vested in the Illinois Commerce Commission, and in matters clearly delegated to the commission its jurisdiction is exclusive, superseding any jurisdiction previously conferred upon cities and villages.

The city cannot compel a railroad to stop its trains at a certain station within the city.

Citations:

Statutes: SH '29, 114: 43, 44.
Id. 111 $\frac{2}{3}$: 8.

Ordinance: Hoover, Spec. Ord. (1915), pp. 754, 767.

Cases: Chicago North Shore and Milwaukee R. R. v. Chicago, 331 Ill. 360 (1928).
Chicago v. O'Connell, 278 Ill. 591 (1917).
Village of Atwood v. Cincinnati, Indianapolis and Western Ry., 316 Ill. 425 (1925).
Northern Trust Co. v. Chicago Rys. Co., 318 Ill. 402 (1925).
City of Witt v. Cleveland, Cincinnati, Chicago and St. Louis Ry., 324 Ill. 494 (1927).

GRADE SEPARATION

(No. 8460—City Council—J. F. G.—July 10, 1934—4½ pp.)

The Public Utilities act withdrew from the city its former regulatory power over the separation of grades at crossings of highways by railroads.

A municipal corporation as a creature of the state has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator and therefore it cannot appeal to the United States Supreme Court from a decision upholding a statute which impairs the city's right in a contract.

(The citations and the original opinion of the foregoing synopsis follow on the next page.)

Citations:

Ordinances: Coun. J. (1910-11), p. 4398 (Traction Elevation ord.).
Id. (1924-25), p. 3604 (amending Track Elevation ord. of 1911).

Cases: Chicago v. Illinois Commerce Commission, 356 Ill. 501 (1934).
Missouri, Kansas and Texas R. R. v. Oklahoma, 271 U. S. 303 (1926).

City of Worcester v. Worcester Consolidated Street Ry., 196 U. S. 539 (1905).

Trenton v. New Jersey, 262 U. S. 182 (1922).

Williams v. Mayor, 289 U. S. 36 (1932).

OPINION OF FOREGOING SYNOPSIS

On May 17, 1934, the Supreme Court of this state filed an opinion in the case of City of Chicago v. Illinois Commerce Commission, ex rel. Chicago and Western Indiana Railroad Company, No. 22145, sustaining an order of the Illinois Commerce Commission which apportioned the cost of the construction of a subway under the tracks of the Chicago and Western Indiana Railroad Company and The New York, Chicago and St. Louis Railroad Company at Ninety-fifth street between the city and the railroads.

The effect of this decision was to abrogate the track elevation ordinance passed by the City Council April 5, 1911, as amended on July 15, 1924, which was accepted by the railroads. By virtue of that ordinance the city vacated certain streets and alleys and undertook to defend all damage suits on account of the track elevation and the railroads on their part undertook to pay the entire cost and expense of the construction of the subway at Ninety-fifth street among others.

Our Supreme Court held that by the passage of the Public Utilities act the General Assembly withdrew from cities the regulatory powers formerly exercised by them over the separation of grades at crossings of highways by railroads and delegated such powers, among others, to the Illinois Commerce Commission and that after the Public Utilities act came into force on January 1, 1914, the city could neither pass new nor enforce existing ordinances with reference to a separation of grades at the crossing of a street or highway by a railroad, the plan for the construction of an improvement to eliminate such a crossing or the apportionment of the cost and expense attendant upon the execution of that plan * * *

In our original brief and argument, as well as in our petition for rehearing, we relied upon a decision of the Supreme Court of the United States in the case of Missouri K. & T. R. R. Co. v. Oklahoma (271 U. S. 303), which held unconstitutional and invalid an order of the Corporation Commission of Oklahoma, corresponding to the Illinois Commerce Commission, requiring the railroad company to pay a portion of the cost of building a subway for the extension of a street through its elevated right of way in contravention of a contract ordinance requiring the city to bear the entire cost of the improvement. The only distinction between our case and the case decided by the Supreme Court of the United States, in our judgment, was that in the United States Supreme Court the railroad claimed the benefit of the contract and in our case the city claimed the same benefit.

* * * * *

Had the decision of our Supreme Court affected the railroads as this decision affects the city, that is, if an order of the Illinois Commerce Commission had apportioned the cost of a grade separation at one of the streets designated in the track elevation ordinance of 1911 as amended whereby the city assumed the entire cost and expense of the construction of a subway, the railroads could have appealed to the United States Supreme Court to reverse the Supreme Court of Illinois. Unfortunately the city's position

is not as favorable as that of the railroads in this regard. The United States constitutional provision enjoining state action which impairs the obligations of a contract does not protect the city against the arbitrary action of the state in nullifying contracts or imposing additional burdens upon the taxpayers of the city. (*City of Worcester v. Worcester Consolidated Street Railway Co.*, 196 U. S. 539, and cases therein cited; *Trenton v. New Jersey*, 262 U. S. 182; *Williams v. Mayor, et al.*, 289 U. S. 36, and cases therein cited.)

In the foregoing cases the Supreme Court of the United States held in substance that a municipal corporation as a creature of the state has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.

* * * * *

Opinions No. 6547 of November 19, 1929, to the Alderman of the 16th ward, No. 7995 of April 4, 1933 and No. 6479 of July 30, 1929, to the Commissioner of Public Works, and No. 7146 of September 24, 1931, to the City Council all discuss the same point as the above opinion.

STREET LIGHTING AT GRADE CROSSINGS

(No. 8368—*Acting Commissioner of Streets and Electricity—E. L. M.*
—April 18, 1934—4½ pp.)

The police power of the state may be invoked to secure adequate street lighting at railroad grade crossing.

The power to compel railroads to provide adequate lighting facilities at grade crossings is now vested in the Illinois Commerce Commission.

In matters delegated to the Illinois Commerce Commission, its jurisdiction is exclusive and supersedes any jurisdiction previously conferred upon the city embracing the same subject matter.

Citations:

Statutes: Cah. '33, 111a: 57.

SH '33, 114: 62.

- Cases:** *Chicago and Northwestern Ry. v. Chicago*, 140 Ill. 309 (1891-92).
City of Bloomington v. Illinois Central R. R., 154 Ill. 539 (1894-95).
Chicago and Northwestern Ry. v. Commerce Commission, 326 Ill. 628 (1928).
Chicago v. O'Connell, 278 Ill. 591 (1917).
Village of Atwood v. Chicago, Indiana and Western R. R., 316 Ill. 425 (1925).
Northern Trust Co. v. Chicago Railways Co., 318 Ill. 402 (1925).
City of Witt v. Cleveland, Cincinnati, Chicago and St. Louis Ry., 324 Ill. 494 (1927).
Chicago Motor Coach Co. v. Chicago, 337 Ill. 200 (1930).
Chester v. Chicago, Burlington and Quincy R. R., 247 Ill. App. 505 (1928).

(The original opinion of the foregoing synopsis is reproduced on the following pages.)

OPINION OF FOREGOING SYNOPSIS

We have your letter of April 3, 1934, in which you state:

"Under date of April 8, 1933, you rendered an opinion which was signed by Michael F. Mulcahy, to the Department of Gas & Electricity covering the refusal of the Chicago Junction Railway to pay for the operation of a 600 candlepower light at its 43rd and Damen avenue grade crossing.

"I am attaching hereto copies of communications from this railroad to the City Comptroller under date of February 26, 1934, copy of my letter to them under date of March 8th, and copy of their reply dated March 21st, in which they deny liability for this particular light. This entire matter is referred to you for consideration, as there is nothing more that we seem to be able to do at this end.

"Please advise what further action should be taken in the matter."

There can be no question about the fact that the adequate lighting of railroad grade crossings and the approaches thereto are essential to the safety and general welfare of the public nor can there be any question of the requirement of such lighting being a proper exercise of the police power of the state. It is also common knowledge that signal lights are something very different from ordinary street lights. They serve an entirely different purpose and are in fact practically useless for lighting purposes.

The power to make and enforce regulations to promote the safety of life and limb is a part of the police power of the state. A railroad company, like other corporations, is always subject to this police power.

Section 8 of the Act of 1874 "in relation to fencing and operating railroads" reads as follows:

"Hereafter, at all of the railroad crossings of highways and streets in this state, the several railroad corporations in this state shall construct and maintain said crossings and the approaches thereto within their respective rights of way, so that at all times they shall be safe as to persons and property."

Our Supreme Court has repeatedly held that this statute is a valid exercise of the police power of the state. *C. & N. W. Ry. Co. v. City of Chicago*, 140 Ill. 309; *City of Bloomington v. I. C. R. R. Co.*, 154 Ill. 539.

The above statute applies not only to crossings that existed when the railroad was built, but also to any crossings afterward created. In this connection our Supreme Court has said:

"* * * a railroad is a public utility deriving its franchise from the state, and by accepting the same agrees to submit to all burdens, conditions and regulations imposed by the state with reference to its tracks and their intersections with highways necessary to promote or secure the safety of the traveling public. Roads and bridges are not merely for local use but are for the use and accommodation of all citizens of the state. (*People v. Williamson County*, 286 Ill. 44.) The constitution supposes the pre-existence of the police power, and its construction must be with reference to that fact. *City of Chicago v. M. & M. Hotel Co.*, 248 Ill. 264." *C. & N. W. Ry. Co. v. Commerce Commission*, 326 Ill. 628.

As we have seen, the police power may be invoked to secure proper and adequate street lighting at grade crossings and the question arises: By whom may this police power be exercised? The original depositary of this power is, of course, the state itself. Subordinate bodies, such as cities and villages, boards and commissions may exercise only such portions of this power as may from time to time be delegated to them by the General Assembly of the state. Formerly cities were entrusted with broad police powers relative to the regulation of public utilities operating within their limits.

But by the passage of the Public Utilities act the General Assembly saw fit to withdraw this power from municipalities and vest the same in a new agency of government, the Illinois Commerce Commission.

Section 57 of "An act concerning public utilities," (chapter 111a of Cahill's Illinois Revised Statutes, 1933, p. 2202) provides:

"The commission shall have power, after a hearing and upon its own motion, or upon complaint, by general or special orders, rules or regulations, or otherwise, to require every public utility to maintain and operate its plant, equipment or other property in such manner as to promote and safeguard the health and safety of its employees, passengers, customers, and the public, and to this end to prescribe, among other things, the installation, use, maintenance and operation of appropriate safety or other devices or appliances * * * and to require the performance of any other act which the health or safety of its employees, passengers, customers or the public may demand."

It will be noted, therefore, that this act gives the Commerce Commission full and broad powers over all corporations that constitute public utilities; and the courts have held that in matters clearly delegated to the commission its jurisdiction is exclusive and supersedes any jurisdiction previously conferred upon cities and villages embracing the same subject matter.

City of Chicago v. O'Connell, 278 Ill. 591.

Village of Atwood v. C., I. & W. R. R. Co., 316 Ill. 425.

Northern Trust Co. v. Chicago Rys. Co., 318 Ill. 402.

City of Witt v. C., C. & St. L. Ry. Co., 324 Ill. 494.

Chicago Motor Coach Co. v. City of Chicago, 337 Ill. 200.

Chester v. Chicago, B. & Q. R. R. Co., 247 Ill. App. 505.

In view of these authorities we are of the opinion that the power to compel railroads to provide adequate lighting facilities at grade crossings is vested in the Illinois Commerce Commission and not in the city. We therefore advise that the proper manner of handling this matter is to file our petition with the Commerce Commission and ask that an order be entered requiring the railroad company to provide adequate lighting facilities at this crossing.

* * * * *

Opinions No. 8007 of April 8, 1933, to the Commissioner of Gas and Electricity; No. 8539 of October 25, 1934, to the Acting Commissioner of Streets and Electricity; and No. 8415 of June 1, 1934, to the Acting Commissioner of Streets and Electricity all discuss the same point as the above opinion.

RAILROAD SAFETY DEVICES

(No. 6891—Commissioner of Public Works—C. J. A.—May 4, 1931—11½ pp.)

The power to compel railroads to use safety devices, such as black and white stripes and signal lights on viaduct structures in the streets, is vested exclusively in the Illinois Commerce Commission.

A railroad company, like other corporations, is always subject to the police power, regardless of the precise language of its charter or of

any contract that it may have entered into with the state or municipality thereof.

Citations:

Statutes: SH '29, 111 $\frac{2}{3}$: 8, 11.

Id., 24: 65.24-28, 66.

Cases: Chicago v. Pennsylvania Co., 252 Ill. 185 (1911-12).

City of Bloomington v. Illinois Central R. R., 154 Ill. 539 (1895).

Chicago v. Pittsburgh, Fort Wayne and Chicago Ry., 247 Ill. 319 (1910-11).

Northern Pacific R. R., v. Minnesota, 208 U. S. 583 (1908).

Illinois Central R. R. v. Stewart, 230 Ill. 204 (1907).

Ward v. Farwell, 97 Ill. 593 (1880-81).

Chicago Motor Coach Co. v. Chicago, 337 Ill. 200 (1930).

Railroad Commission of California v. Southern Pacific Co., 264 U. S. 331 (1924).

Chicago and Northwestern Ry. v. Commerce Commission, 326 Ill. 625 (1930).

Opinion No. 7550 of April 16, 1932, to the Commissioner of Public Works discusses the same point as the above opinion.

INSTALLATION COSTS OF SAFETY MARKERS AT VIADUCTS

(No. 7997—*Commissioner of Public Works*—F. J. B.—April 5, 1933—2 $\frac{1}{2}$ pp.)

All powers over railroads which the city formerly had, have been vested exclusively in the Illinois Commerce Commission and the city cannot compel the railroad to pay for the installation by the city of safety markers at the railroad's viaducts.

The city should request the railroad to install the safety markers, and if it refuses, the city should petition the Illinois Commerce Commission to order the railroad to install the markers. The commission, if it sees fit, can apportion the cost between the city and the railroad.

Citations:

Statutes: SH '29, 111 $\frac{2}{3}$: 8, 61.

Cases: Village of Atwood v. Chicago, Indiana and Western R. R., 316 Ill. 425 (1925).

City of Witt v. Cleveland, Cincinnati, Chicago and St. Louis Ry., 324 Ill. 494 (1927).

EXCESSIVE BLOWING OF WHISTLES

(No. 7313—F. J. B.—November 23, 1931—1 $\frac{1}{2}$ pp.)

The excessive blowing of locomotive whistles does not violate any city ordinance, but formal complaint in this regard may be made to the Illinois Commerce Commission.

CITY'S CONTROL OVER RAILROAD TRACKS IN STREETS

(No. 8488—*Superintendent of Compensation—J. F. G.—August 13, 1934—2½ pp.*)

The state legislature has conferred upon the Illinois Commerce Commission (successor to the Public Utilities Commission) exclusive jurisdiction in the matter of the operation of railroads over or across city streets and state and county highways; hence the city, upon the expiration of any license heretofore granted any railroad by ordinance, can neither compel the removal of tracks which were lawfully constructed and maintained across city streets, nor can it compel such railroad to secure from the city a renewal of any such privileges.

Citations:

Ordinance: Coun. J. (July 22, 1912), p. 1455.

Cases: Village of Atwood v. Cincinnati, Indianapolis and Western R. R., 316 Ill. 425 (1925).

Chicago Motor Coach Co. v. Chicago, 337 Ill. 200 (1930).

Chicago v. Commerce Commission, 356 Ill. 50 (1934).

Opinion No. 6722 of July 18, 1930 to the Commissioner of Public Works discusses the same point as the above opinion.

Consent to Use of Streets: Consent of the city is required for the original establishment of public utility structures in city streets but no such consent is required for the continued occupation of city streets by the utility structures nor can the city order the removal of such structures.—City of Geneseo v. Illinois Northern Utilities Co., 363 Ill. 89 (1936).

NON-COMPLIANCE WITH ILLINOIS COMMERCE COMMISSION ORDER

(No. 8317—*Illinois Commerce Commission—J. F. G.—February 23, 1934—3 pp.*)

A lack of funds is not a legal excuse for the failure of a railroad company to comply with an order of the Illinois Commerce Commission.

Citation:

Case: Erie Railroad v. Board of Public Utility Commissioners, 254 U. S. 394, 410 (1921).

(2) *Powers and Obligations of City**

RAILROAD STORAGE AND HANDLING OF EXPLOSIVES

(No. 7932—*M. H. F.—February 7, 1933—5½ pp.*)

Railroads engaged in interstate commerce are obliged to comply

*See also Opinion No. 8343, p. 532, on licensing railroad machine shops.

with the ordinance regulating the storage and handling of explosives within the city.

Neither the State Utilities act nor the Federal act regulating the transportation of explosives has impliedly repealed the city's power to regulate the storage, use and handling of explosives within the city, even as applied to railroad companies.

Citations:

Statute: SH '31, 24: 65.

Ordinance: Code '31: 3973-4002.

Cases: Fligelman v. Chicago, 348 Ill. 294 (1932).

Klever Karpel Kleaner v. Chicago, 323 Ill. 368 (1927).

Spiegler v. Chicago, 216 Ill. 114 (1905).

Actiesselskabet Ingrid v. Central Railway, 216 Fed. 72 (1914).

OPINION OF FOREGOING SYNOPSIS

We have given further study to the matter discussed in conference with the subcommittee of the Western Conference of Railway Counsel, relative to compliance by the Chicago railroads, with the city's ordinance regulating the storage and handling of explosives.

While we are inclined not to disagree with that part of the conclusion reached by the committee which states that railroads engaged in interstate commerce are not obliged to comply with the ordinance in so far as the *transportation* of explosives is concerned, we cannot agree that the city's ordinance is rendered inapplicable to these railroads and that the city's power to regulate the storage, use and handling within the city of explosives is impliedly repealed by the federal act regulating the transportation of explosives or by the State Utilities act.

By section 65 of article V of the Cities and Villages act (chapter 24, Smith's Stat., 1931) the legislature delegated to cities in Illinois express power—

"To regulate and prevent storage of gunpowder, tar, pitch, resin, coal oil, benzine, turpentine, hemp, cotton, nitroglycerine, petroleum, or any of the products thereof, and other combustible or explosive material," etc.

Pursuant to the above statutory authority the city's ordinance regulating the handling of explosives was passed, which ordinance is referred to in your opinion and is found in sections 3973 to 4002 of the Revised Chicago Code of 1931. By these sections any person, firm or corporation keeping, selling, using or giving away any black powder, guncotton, giant powder, dynamite, nitroglycerine, fulminate of mercury or any other explosives, etc., must make application for and obtain an annual license and pay a license fee therefor; must file with the Fire Marshal a surety bond and must obtain a certificate of fitness for employes handling such explosives, and submit to other regulatory provisions contained in the ordinance. The prescribed annual license fee is ten dollars.

Other city ordinances regulating the storage and handling of combustibles, and which find support in section 65 of article V of the Cities and Villages act, are those regulating gasoline filling stations, upheld by the Supreme Court of Illinois in the case of Fligelman v. City of Chicago, 348 Ill. 294; the dry cleaning business, sustained in Klever Karpel Kleaners v. City of Chicago, 323 Ill. 368; and the oil peddlers, upheld in Spiegler v. City of Chicago, 216 Ill. 114.

The city would therefore seem to possess authority to regulate the storage and handling of explosives by railroads as well as others unless such

authority has been repealed or rendered nugatory by some federal or state law.

We have examined the federal act regulating the transportation of explosives, and also the Illinois Utilities act, and while these enactments appear to vest in the Interstate Commerce Commission and the Illinois Commerce Commission general regulatory authority over transportation by railroads and, by the Federal act, over the transportation of explosives, they do not, in our opinion, divest the municipality of power to regulate the storage, handling and use of explosives by railroads when such storage, handling or use is not directly connected with, so as to be parts of, transportation.

The first mentioned act is an act regulating the *transportation* of explosives. It states that "the Interstate Commerce Commission shall formulate regulations for the safe *transportation* within the limits of the jurisdiction of the United States of explosives and other dangerous articles, including inflammable liquids," etc. Its terms are no broader and the authority conveyed by it to the Interstate Commerce Commission is no more extensive than authority to regulate the interstate transportation of explosives.

The case of *Ingrid v. Central R. R. Co.*, 216 Fed. 72, upon which you rely to show that the Federal act governs exclusively and supersedes local laws, was a case involving the transportation of explosives and not their storage within a city. It concerned a shipment of dynamite by the Du Pont Company from Kenilworth to Jersey City by rail and from Jersey City to Montevideo by steamer. The dynamite exploded a short time after the work of transferring from railroad car to lighter commenced. The Circuit Court of Appeals in its opinion, on page 81, said:

"And we agree with the court below in its opinion that the dynamite *was not being held in storage but was still in course of transportation.*"

Upon this state of facts the court held that the dynamite in question was subject exclusively to the regulations of the Interstate Commerce Commission.

With reference to the State Utilities act it is our opinion that while this act and the decisions of the Supreme Court of Illinois construing it vest in the Illinois Commerce Commission exclusive authority over railroads in so far as transportation is concerned, and abrogate the city's power to enact and enforce ordinances regulating railroads in the transportation of persons and property, they do not directly or impliedly repeal the city's power to regulate the storage and handling of property not in course of transportation. Hence, while explosives are not being transported by railroad and while they are being used, stored or handled within the city by a railroad company, they and the railroad are subject to the municipality's laws and regulations. If this conclusion were not sound then a railroad company might, with total disregard for the public safety and welfare, use, for example, dynamite in blasting for some road or terminal facilities project, and be left wholly unsupervised and unregulated in such use. It might conduct the business of warehousing great quantities of high explosives in the city in an unsafe manner, and thereby jeopardize the lives of scores of individuals, and handle such combustible material in its use and storage operations with wanton carelessness and disregard for life and property and without any regulation by the public authorities whatsoever. As the Federal act regulating the transportation of explosives governs only the safe transportation of such explosives, and as the State Utilities act is entirely lacking in regulatory provisions covering the matter, and, as we contend, relates to the business of transportation only, we cannot believe that it was the intention of the law makers to repeal local laws and leave the public unprotected in this important matter.

Just where transportation ends and storage begins is a question not now before us, but we have every confidence that the city's power to regulate the storage, use and handling of explosives unconnected with the transporta-

tion thereof has not been abrogated by the above mentioned federal and state laws.

* * * * *

Building Inspection: The power granted to the city to control and regulate buildings and elevators was not repealed by the passage of the Public Utilities acts of 1913 and 1921.

Buildings owned by a railroad and used by it for general offices, for the storage of records and the handling of freight or leased by it to tenants for that purpose are subject to the building code of the city with respect to regulation and inspection.—*Chicago v. Alton Railroad*, 355 Ill. 65 (1934).

Opinions No. 7531 of April 7, 1932, to the Comptroller and No. 7368 of December 11, 1931, to the Chief Inspector, Department for Inspection of Steam Boilers, discuss the same point as the above case.

SPECIAL USE OF STREETS

(No. 7172—*City Comptroller—M. H. F.—October 7, 1931—1½ pp.*)

The city may charge a railroad corporation, even though it be a public utility, compensation fees for electrical signs projecting over public streets and sidewalks and other special uses of the public way in the same manner as any individual.

INSPECTION OF ELECTRIC SIGNS

(No. 7170—*M. H. F.—October 6, 1931—4½ pp.*)

Electrical signs attached to the railroad structure but projecting over the public streets and sidewalks of the city may be inspected by the city and a fee charged and collected for such inspection.

All electrical equipment not used in the actual operation of a railroad is under the supervision of the Electrical Inspection Bureau of the city.

Citations:

Statute: Cah. '27, 24: 563 (7).

Ordinance: Code '31: 1821.

Case: *Berry v. Chicago*, 320 Ill. 536 (1926).

INSPECTING RAILROAD SCALES*

(No. 7857—*Inspector, Department of Weights and Measures—M. H. F.—December 27, 1932—1½ pp.*)

Railroad companies operating scales not used exclusively by the carrier, but which may be used to any extent in weighing commodities

*See also Opinion No. 7860, p. 367.

for the general public, must comply with the city ordinance and pay the prescribed fees for the inspection of such scales.

No inspection fee may be exacted for the inspection of such railroad scales as are used exclusively in weighing freight received for transportation.

Citations:

Ordinances: Code '31: 528, 535, 2941.

Case: Chicago v. Chicago, Great Western Railroad, 348 Ill. 193 (1932).

Opinion No. 7562 of May 4, 1932, to the City Comptroller discusses the same point as the above opinion.

GATES AND SAFETY SIGNALS

(No. 7466—Jud. G.—February 27, 1932—2½ pp.)

The city has no control or supervision over the Chicago, Milwaukee and St. Paul Railroad in the operation of its trains or the maintenance of its gates or its safety signals.

Citations:

Statute: SH '29, 111²/₃: 8.

Cases: Chicago, North Shore and Milwaukee Railroad v. Chicago, 331 Ill. 371 (1928).

Northern Trust Company v. Chicago Railways Co., 318 Ill. 402 (1925).

Village of Atwood v. Cincinnati, Indianapolis and Western Railroad, 316 Ill. 425 (1916).

Hite v. Cincinnati, Indianapolis and Western Railroad, 284 Ill. 297 (1918).

Chicago v. O'Connell, 278 Ill. 591 (1917).

TRACK ELEVATION ORDINANCES*

(No. 8754—City Comptroller—J. F. G.—April 25, 1935—1½ pp.)

The city was divested of its power to pass or enforce track elevation ordinances by the Public Utilities act of 1913.

The city is not liable to pay a claim based on the provisions of the track elevation ordinances.

Citation:

Case: Chicago v. Commerce Commission, 356 Ill. 501 (1934).

*See also Opinion No. 8460, p. 596.

TITLE TO VACATED STREETS UNDER TRACK ELEVATION ORDINANCE*

(No. 7242—*Superintendent, Bureau of Maps and Plats—J. F. G.—November 2, 1931—1½ pp.*)

The Chicago and Western Indiana Railroad Company cannot claim the benefit of the vacation of streets and alleys by any track elevation ordinance when it disavows its obligations under that ordinance. Until such time as the railroad sees fit to perform all its obligations, the city should not confirm title to any of the streets and alleys involved.

Citation:

Ordinance: Coun. J. (1910-11), p. 4398.

PAYMENT OF SUBWAY CONSTRUCTION COSTS*

(No. 8518—*Acting Commissioner of Streets and Electricity—J. F. G.—October 8, 1934—3 pp.*)

The city is under no obligation to pay the apportioned cost of constructing a subway to a railroad company as per ordinance since the jurisdiction over railroads has been held to be exclusively vested in the Illinois Commerce Commission, nullifying ordinances pertaining thereto.

Citations:

Ordinances: Coun. J. (1910-11), p. 4398.

Id. (1928-29), p. 3678, 3697, 3735.

Case: Chicago v. Illinois Commerce Commission, 356 Ill. 501 (1934).

CITY'S LIABILITY FOR TRACK ELEVATION*

(No. 8786—*J. F. G.—June 4, 1935—2 pp.*)

A railroad which elevated its tracks after the Public Utilities act became effective cannot compel the city to reimburse it for any damage resulting from the track elevation, even though the contract ordinance providing for the elevation of the tracks was accepted before the Public Utilities act became effective.

Citations:

Ordinance: Coun. J. (1912-13), p. 132 (Track Elevation ord.).

Case: Chicago v. Illinois Commerce Commission, 356 Ill. 501 (1934).

RAILROAD TERMINAL CHANGES FOR STREET EXTENSION

(No. 6555—*Chairman, Committee on Railway Terminals—R. N. L.—December 3, 1929—2½ pp.*)

The Illinois Commerce Commission does not have the power to enter

*See also Opinion No. 8460, p. 596.

an order giving the state's consent for railroads to make the terminal changes necessary for a street extension until the City Council has passed the proper ordinance for that street extension.

Citation:

Statute: Public Utilities act, sec. 50.

*(3) Rights and Duties of Railroads**

TIME EXTENSION ON RAILROAD CONTRACT

(No. 7651—Committee on Railway Terminals—J. F. G.—July 15, 1932—2½ pp.)

Reconstruction of certain station platforms and additional safety requirements may be made a condition for the proposed extension of time to the Illinois Central Railroad Company to perform its existing obligations under existing ordinances. While such an amendatory ordinance, if accepted by the railroad company, becomes a binding contract between the city and the railroad, the subject matter is within the exclusive jurisdiction and control of the Illinois Commerce Commission, and the terms of the contract cannot be specifically enforced.

Citation:

Ordinance: Coun. J. (1919-20), p. 969.

SALE TO RAILROAD OF RIGHT OF WAY

(No. 7996—Commissioner of Public Works—J. F. G.—April 5, 1933—3 pp.)

The sale to a railroad of a right of way across township school property is not required to be made at a public vendue upon petition of the voters and after an election and notice by publication.

Citations:

Statutes: School act, secs. 20, 33, 34, 40, 40(a), 220.

*See Opinion No. 6510, p. 560, on the status of railroad property under the zoning ordinance.

TITLE TO RAILROAD RIGHT OF WAY UPON ABANDONMENT— FENCING OF RAILROAD TRACKS*

(No. 7108—Alderman, 7th Ward—C. J. A.—September 2, 1931—7 pp.)

Where a railroad company acquires by condemnation or purchases an easement or a right of way over certain land, it does not acquire title to such land but the fee remains in the owners to whom the land reverts upon its abandonment by the railroad company.

Since a non-existent railroad company does not have the power either to operate a railroad or to fence the same, the legal existence of a railroad company must be determined before it can be compelled to fence its tracks.

Citations:

Constitution: Illinois, art. II, sec. 13.

Ordinances: Hoover, Spec. Ord. (1915), p. 910.

Coun. J. (1894-95), p. 2613.

Id. (1906-07), p. 3216.

Id. (1919-20), p. 969.

Id. (1924-25), 3574, 3594.

Cases: Branch v. Central Trust Co., 320 Ill. 432 (1926).

Walker v. Illinois Central Railroad Co., 215 Ill. 610 (1905).

LIABILITY FOR GRADE CROSSING LIGHTS

(No. 6496—Commissioner of Gas and Electricity—F. J. C.—August 22, 1929—2 pp.)

Railroad companies are not liable for the maintenance of street lights at grade crossings unless there is a binding contract or a provision in the ordinance under which the company operates that provides for such liability.

LIGHTING OF STREETS AND SUBWAYS BY RAILROADS

(No. 7338—Commissioner of Gas and Electricity—C. J. A.—December 2, 1931—2½ pp.)

A railroad company cannot be required to furnish any different or greater amount of light for the subway under its tracks than it has agreed to supply in its contract ordinance with the city.

Where a railroad company has agreed to light a street and the ordinance does not further define these terms, the company is required to furnish such light as, in the opinion of the Commissioner of Gas and Electricity, would be reasonably adequate.

Citation:

Case: Chicago v. Pennsylvania Co., 252 Ill. 185, 192 (1911-12).

*See also Opinion No. 6470, p. 647.

DUTY OF THE A. T. AND S. F. RAILROAD TO LIGHT SUBWAYS

(No. 8638—*Acting Commissioner, Department of Streets*—W. L. S.—*January 23, 1935*—5 pp.)

The Atchison, Topeka and Santa Fe Railroad is not freed from its obligation to light certain subways, which duty it assumed under the contract ordinance of 1925, since the contract ordinance of 1930 in no way releases it.

Citations:

Ordinances: Coun. J. (1925-26), p. 1039.
Id. (1930-31), p. 3994 (Track elevation ord.).

EFFECT OF TRACK AUTHORIZATION ORDINANCE

(No. 7015—*Commissioner of Compensation*—C. J. A.—*July 17, 1931*—3 pp.)

Where a track was laid by Company A in the same area as the one of Company B but at a different time and under a different ordinance, the ordinance authorizing the track of Company B does not apply to this new structure of Company A, even though it may serve the same purpose as the previous one.

Citations:

Ordinances: Coun. J. (1909-10), p. 3835 (Chicago Refrigerator Car Co. Switch Track ord.).
Id. (1925-26), p. 1298 (Chicago River and Indiana Railroad Co.).

OBLIGATIONS UNDER LAKE FRONT ORDINANCE*

(No. 7648—*Committee on Railway Terminals*—J. F. G.—*July 13, 1932*—2 pp.)

The lake front ordinance of 1919 is still in force and effect subject to the amendments passed and accepted by the interested parties. The ordinance with its amendments constitutes a contract, the provisions of which must be fulfilled by the accepting parties.

STREET CROSSING CHARGES FOR KENSINGTON AND EASTERN RAILROAD

(No. 7508—*City Comptroller*—J. F. G.—*March 23, 1932*—2½ pp.)

Under the terms of the lake front development ordinance, if the tracks of the Kensington and Eastern Railroad cross an alley, either fifty dollars compensation, or the stipulated charge per lineal foot for each track crossing the alley is required to be paid, depending on

*See also Opinion No. 6553, p. 694, on extra compensation to a railroad for additional work necessitated by the river straightening ordinance.

whichever is the greater amount. Where the tracks of the railroad cross a street or other public way, the compensation required is, either \$100, or the stipulated charge per lineal foot for each track crossing the street or other public way, depending on whichever is the greater amount.

Citations:

Ordinance: Coun. J. (1930-31) p. 987 (Lake Front Development ord., sec. 32).

Other reference: Opinion No. 6790 (this page).

STREET CROSSING CHARGES FOR KENSINGTON AND EASTERN RAILROAD*

(No. 6790—City Comptroller—R. N. L.—October 17, 1930—4½ pp.)

The lineal foot charge provisions of the lake front improvement ordinance for street crossings of the Kensington and Eastern Railroad apply to each track laid across each street crossing. The minimum charge provisions refer to each crossing regardless of the number of tracks.

Citations:

Ordinance: Coun. J. (1919-20), p. 987 (Lake Front Improvement ord., sec. 32).

Other reference: Words and Phrases, pp. 110, 1763, "crossing," "railroad crossing."

ILLINOIS CENTRAL'S LIABILITY FOR GRADE CHANGE

(No. 7117—Commissioner of Public Works—J. F. G.—September 10, 1931—6 pp.)

The Illinois Central Railroad Company is liable for all damages to private property, present and future, resulting from the change in the viaduct grade of East Randolph street, under the lake front improvement ordinance of 1929.

Citations:

Ordinances: Coun. J. (1919-20), pp. 969, 971.

Id. (1929-30), p. 1321 (Lake Front Improvement ord.).

Cases: John Morris Co. v. Southworth, 154 Ill. 118 (1894-95).

Conway Co. v. Chicago, 274 Ill. 369 (1916).

CITY'S LIABILITY TO ILLINOIS CENTRAL UNDER LAND PURCHASE CONTRACTS

(No. 7576—Mayor—L. H.—May 13, 1932—3½ pp.)

The Illinois Central Railroad would probably have a valid and enforceable claim for expenses incurred in connection with the proposed sale of land by the railroad to the city, since the city's officers, under

*See Opinion No. 7825, p. 645, on the payment of compensation by the Kensington and Eastern Railroad for crossing a dedicated alley.

the authority of an ordinance, have gone far in making agreements and accepting specific terms.

The fulfillment of the condition specified in the ordinance and which requires certain assurances from the United States government, will have a bearing as to whether or not the railroad company was justified in incurring the expenses for which it now seeks reimbursement. The ordinance so authorizing the Comptroller to purchase this land, does not bind the city to a specific performance of this contemplated purchase.

Citation:

Ordinance: Coun. J. (1931-32), p. 231.

STEAM AND ELECTRICAL OPERATION OF RAILROADS IN CITY

(No. 8839—*Mayor—J. F. G.—August 9, 1935—3½ pp.*)

Steam locomotives may be used north of East Roosevelt road by the Illinois Central Railroad, but only to transport fruit and vegetable trains of other railroads.

Electrification under the lake front development ordinance includes not only operation by electricity but also by any motive power, the operation of which is not accompanied by emission of smoke, cinders, noxious gases, or by noises more objectionable than those produced by electrical operation.

Citations:

Ordinances: Coun. J. (1919-20), pp. 969, 980, 981 (Lake Front Development ord.); amended, Coun. J. (1920-21), p. 1922.

USE OF MEZZANINE FLOOR UNDER ILLINOIS CENTRAL VIADUCTS

(No. 6449—*Chairman, Committee on Railway Terminals—R. N. L.—June 11, 1929—1½ pp.*)

Neither the city nor the public would have the right to use the mezzanine floor which a proposed ordinance gives the Illinois Central Railroad Company the right to construct under its viaducts.

SUBLEASING SPACE IN RANDOLPH STREET STATION

(No. 7088—*Alderman, 1st Ward—C. J. A.—August 24, 1931—6 pp.*)

There is nothing in the ordinance of October 24, 1929, prohibiting the Illinois Central Railroad Company from subleasing reasonable amounts of space in its Randolph Street station for such a business

as a restaurant or for the sale of tobacco, cigars, papers or periodicals in the manner allowed by law in railroad stations.

Citations:

Ordinance: Coun. J. (1929-30), p. 1333.

Cases: State v. Illinois Central Railroad Co., 246 Ill. 188 (1910).
 Jacksonville, Mayport, Pablo Railway and Navigation Co. v. Hooper, 160 U. S. 514 (1896).
 Louisville Property Co. v. Commonwealth, 146 Ky. 827, 143 S. W. 412 (1912).
 People v. Pullman Palace Car Co., 175 Ill. 125 (1898).
 Foster v. London, Chatham, and Dover Railway Co., L. R. 1 Q. B. (1895) 711.
 Sears v. Chicago, 247 Ill. 204 (1910-11).
 Chicago, Milwaukee, and Saint Paul Railroad Co. v. Crawford County Supervisors, 48 Wis. 666 (1880).
 Abraham v. Oregon and California Railroad Co., 37 Ore. 495 (1900).
 State v. Baltimore and Ohio Railroad Co., 48 Md. 49 (1877).

REFUND OF COMPENSATION FOR SWITCH TRACK

(No. 8883—*Chairman, Committee on Finance—J. J. S.—September 25, 1935—4½ pp.*)

Compensation paid to the city for a switch track for a period subsequent to its removal under an ordinance repealing the switch track ordinance was paid under a mistake of fact and may be refunded by the City Council.

Citations:

Ordinances: Coun. J. (1911-12), p. 1259 (Switch Track ord.); repealed Coun. J. (1934-35), p. 3751.
 Id. (1930-31), p. 3701 (North Wabash Ave. Bridge ord.).
 Code '31: 2913.
 Cases: Yates v. Royal Insurance Co., 200 Ill. 202 (1902-03).
 Ronde v. Chicago, 254 Ill. App. 590 (1912).
 Village of Morgan Park v. Knapp, 199 Ill. 444 (1902).
 Other reference: Op. Corp. Counsel (1911-12), p. 1240.

CANCELLATION OF WARRANT FOR SWITCH TRACK PRIVILEGES—REMOVAL OF SWITCH TRACK

(No. 8336—*City Comptroller—L. V. R.—March 20, 1934—2½ pp.*)

The cancellation of a warrant for the privilege of a switch track is not dependent on the removal of the track. If the switch track has been abandoned, it can be removed by the Commissioner of Public Works after giving sixty days' notice in accordance with the ordinance granting the switch track privileges.

Citation:

Ordinance: Coun. J. (1916-17), p. 3755 (Chicago Dry-Kiln Co. switch track ord., secs. 2, 3, 5).

RELEASE OF CHICAGO RIVER AND INDIANA RAILROAD FROM ANNUAL COMPENSATION

(No. 6586—City Comptroller—R. N. L.—January 17, 1930—7 pp.)

There is no provision in the Chicago River and Indiana Railroad Co. switch track ordinance of January 11, 1922 that releases the railroad company from paying the city the annual compensation required during the term of the ordinance for the privileges enjoyed merely because it has elevated its tracks as directed by the ordinance.

Citation:

Ordinance: Coun. J., Jan. 11, 1922, pp. 1652-53 (Chicago River and Indiana Railroad Co. switch track ord.).

COMPENSATION DEBT OF CHICAGO RIVER AND INDIANA RAILROAD

(No. 7528—City Comptroller—Jud. G.—April 6, 1932—5 pp.)

The Chicago River and Indiana Railroad is still enjoying the privileges for which it agreed to pay \$400.00 a year under the terms of the ordinance that granted these privileges and, hence, it is indebted to the city.

Citation:

Ordinance: Coun. J. (1921-22), p. 1652 (Ordinance granting the Chicago River and Indiana Railroad Co. permission to lay switch tracks across West 47th and West 43d Streets).

CHICAGO RIVER AND INDIANA RAILROAD'S LIABILITY FOR SWITCH TRACK COMPENSATION

(No. 8748—J. F. G.—April 17, 1935—6½ pp.)

The Chicago River and Indiana Railroad Company is liable for compensation for maintaining switch tracks across West 43d and West 47th streets.

There is no inconsistency between the track elevation ordinance of April 22, 1912, and the track elevation ordinance of January 11, 1922, but if there were, section 2 of the ordinance of 1922 would prevail over paragraph 7 of the ordinance of 1912. When two ordinances are seemingly repugnant, they are to be construed, if possible, so that the later one will not repeal the former by implication.

Citations:

Ordinances: Coun. J. (1921-22), p. 1653, sec. 2.
Id. (1912-13), sec. 7 (Switch track elevation ord.).

Cases: *People v. Hammel*, 215 Ill. 43 (1905).
People v. Chicago Ry., 270 Ill. 87 (1915).
People v. Wabash R. R., 276 Ill. 92 (1917).
Consolidated Coal Co. v. Schneider, 163 Ill. 393 (1896).
People v. Shader, 326 Ill. 145 (1928).
Galpin v. Chicago, 159 Ill. App. 135 (1911).

CITY'S LIABILITY FOR DERAILED TRAIN OF C. AND I. W. RAILROAD

(No. 7675—*Commissioner of Public Works—Jud. G.—July 30, 1932—2 pp.*)

Under the contract of May 25, 1916 with the Chicago and Illinois Western Railroad Company, the city is liable for the maintenance, but not the operation, of a certain switch track and therefore is not liable for the cost of rerailing a train derailed by a faulty rail.

PERMIT FOR SWITCH TRACK CONSTRUCTION BY C. B. AND Q. RAILROAD

(No. 7777—*C. J. A.—October 14, 1932—2 pp.*)

The ordinance of October 4, 1886, authorizing the construction of switches, turnouts, and the like by the Chicago, Burlington and Quincy Railroad Company, gives that company a continuing privilege to build new switch tracks on the street named, at any time in the future when the need of abutting property owners should so require. The Commissioner of Public Works therefore has the authority to issue a permit for such construction without any further authorization from the City Council.

Citations:

Ordinance: Coun. J. (1886-87), p. 290.

Other reference: Op. Corp. Counsel (1923-24), p. 236.

B. LOCAL TRANSPORT

*(1) Local Transport in General**

Home Rule Over Local Transport: The city is authorized to exercise exclusive control over the location, extensions and equipment of local transportation companies if such proposition is approved by referendum.—Ill. Laws (1935), p. 283—Approved by referendum April 14, 1936.

AMENDMENTS TO TRACTION ORDINANCE

(No. 8332—*Committee on Local Transportation—J. F. G.—March 16, 1934—13½ pp.*)

Any material amendment to the comprehensive traction ordinance becomes a part of the original grant of a terminable permit and must be submitted to the electors for approval before it can be accepted

*See opinions, pp. 736, 737 on expenditures from the traction fund.

by the grantee as a binding franchise ordinance; this referendum can be avoided only by an act of the legislature so providing for its avoidance.

The power of the city to enact such an ordinance was derived solely from the state legislature and its acceptance by popular referendum was required.

Citations:

Constitution: Illinois, art. XI, sec. 5.

Statutes: SH '33, 131 $\frac{1}{4}$: 1, 2.

Ordinance: Coun. J. (1930-31), p. 2980 (Comprehensive traction ord.).

Cases: *People v. Brislin*, 80 Ill. 423 (1875).

Bank of The Republic v. County of Hamilton, 21 Ill. 53, 61 (1858-59).

Wilson v. Mackinaw State Bank, 217 Ill. App. 494, 499 (1921).

People v. Dreher, 302 Ill. 50, 54 (1922).

City of Carlyle v. Nicolay, 333 Ill. 562, 568 (1929).

Fields v. Lueders, 274 Ill. 562 (1916).

Birmingham Waterworks v. City of Birmingham, 211 Fed. 497 (1913).

Long v. City of Shreveport, 151 La. 423 (1921).

Allen v. Hollingworth, 246 Ky. 812 (1933).

Other reference: Pond, Public Utilities, sec. 141.

OPINION OF FOREGOING SYNOPSIS

Reference is made to your letter of February 9th wherein you request an opinion as to whether or not it is possible for the City Council to amend the comprehensive traction ordinance above referred to, in the particulars hereinafter enumerated, without submitting same to the voters of the city for approval:

"(1) An amendment to require the Chicago Local Transportation Company to pave, and keep in repair, the center sixteen feet of the roadway on streets over which the company operates feeder busses.

"(2) An amendment to provide that the annual payment of compensation of 3% of the gross receipts shall not be subordinated, or made junior, to interest on any bonded indebtedness, sinking fund requirements, dividends, etc.

"(3) An amendment to obligate the company, under penalty of forfeiture of the franchise, to make certain of the extensions, additions and improvements listed in the ordinance to be made in the initial construction period, without such extensions, additions and/or improvements being subject to the sale of securities or subject to any other conditions now contained in the ordinance."

The comprehensive traction ordinance was passed by the City Council on May 19, 1930, and approved by the voters of the city on July 1, 1930, pursuant to an act of the state legislature relating to terminable permits, approved June 19, 1929 (Smith-Hurd's Illinois Revised Statutes, 1933, chapter 131 $\frac{1}{4}$, page 2832).

Section 1 of that act gives power to every municipality to grant consent, permission and authority to construct, maintain and operate street railways upon streets and public ways in such municipality without limiting or fixing any time for the duration of such grant, designated as a "terminable permit." It is provided that such terminable permit may contain provisions for the purchase of the local transportation properties by the municipality and that it "may contain any other terms and conditions (including, but not

limited to reasonable provisions for specified extensions and additions to lines and facilities, the retirement of investment by amortization or otherwise, or for compensation for the use of public property computed either by some proportion of the receipts from the operation of the property of the grantee, or otherwise) not contrary to or inconsistent with this act or with the lawful exercise of the power of the state to regulate public utilities;
* * *"

Section 2 of the act provides that no ordinance of any municipality granting a terminable permit shall become operative or effective until a proposition to approve the ordinance shall have been submitted to the electors of such municipality. The form of the ballot required for submission of the proposition to a vote of the people is indicated in the statute as follows:

"Shall the ordinance passed by the City Council (or board of trustees, etc.), of (name of municipality) on the day of, 19..., entitled, which granted permission for a term of years to (here insert the name of the grantee) to locate, construct, reconstruct, maintain, operate and/or lay tracks, of said (here insert the name of the grantee) in certain streets, alleys and public places upon the terms and conditions therein stated, be approved?"

It will be noted that the General Assembly considered the subject matter of the proposed amendments referred to in sub-paragraphs (2) and (3) of your inquiry, relating to the compensation for the use of public property and extensions and additions during the life of the grant, of sufficient importance to provide specifically for its inclusion in any ordinance granting a terminable permit. The subject matter of sub-paragraph (1) of your letter, relating to the obligation of the grantee to pave and keep in repair a part of the streets over which the grantee shall operate some of its public utility transportation facilities, is equally important as an item covered by "any other terms and conditions" which such terminable permit "may contain." Without provision for the maintenance and repair of the streets in the franchise ordinance the grantee could not be compelled to pave and keep in order any part of the streets. (*Lynchburg Traction & Light Co. v. City of Lynchburg (Va.)*, 128 S. E. 606; *Pond, Public Utilities*, sec. 141, p. 334.)

All three of the proposed amendments are material "terms and conditions" which, according to the form of ballot set forth in the act relating to terminable permits, the voters of the City of Chicago are given the privilege of accepting or rejecting. If the comprehensive traction ordinance had been accepted by the Chicago Local Transportation Company, the grantee therein named, there could be no doubt that the obligations of the grantee in respect of the subject matter of all of the proposed amendments would have constituted a binding contract which could not be abrogated or modified except with the consent of the grantee. The people of the City of Chicago, who by their vote have accepted the ordinance, likewise have a substantial interest in the subject matter of the proposed amendments because every additional material burden imposed upon the grantee increases its operating expenses and affects the rate of fare which the people may be required to pay in order to allow the grantee a reasonable return upon its investment as required by law.

We are, therefore, faced with the fundamental question as to whether a franchise ordinance, which a statute requires to be approved by vote of the people before it may become effective, can be materially amended before its acceptance by the grantee without submitting such amendment to a similar vote.

We have searched in vain for a precedent in Illinois which may be considered decisive of the question before us. There are a number of cases in this jurisdiction arising out of constitutional and statutory provisions requiring certain laws authorizing the creation of public or private corporations to

be approved by popular vote. In these cases the question has arisen as to whether such corporations were subject to amendatory laws which were not submitted to the people for approval. In all of these cases the objection to the validity of the amendment was made by a corporation which had accepted the benefits of the original law approved by the people. Our Supreme Court in such cases has distinguished between amendments affecting the property rights or contract rights of those who accepted the benefits of the original act and amendments within the domain of ordinary or general legislation which did not invade property rights or contract rights (*The People ex rel. v. Brislin*, 80 Ill. 423). Amendments which the court considered to be within that category which did not invade the property rights or contract rights of the corporations in question were sustained, although such amendments were not submitted to a vote of the people (*Bank of the Republic v. County of Hamilton*, 21 Ill. 53, 61; *Reapers' Bank v. Willard et al.*, 24 Ill. 433, 439; *Smith v. Bryan*, 34 Ill. 364, 377; *Wilson v. Mackinaw State Bank*, 217 Ill. App. 494, 499).

The provision involved in the cases last cited was section 5 of article XI of the Constitution of 1870 which provides that no act of the General Assembly authorizing or creating corporations or associations with banking powers, *nor amendments thereto*, shall go into effect unless the same shall be submitted to a vote of the people. It may be said that cases arising under this constitutional provision are not applicable to the present question because, under the constitutional provision referred to, a vote of the people is expressly required not only for the original law but for all amendments thereto while the terminable permit act specifies only that the ordinance granting a terminable permit shall be submitted to the electors and makes no reference to any amendments thereto.

It must be remembered that there are no inherent powers in municipal corporations (*The People v. Dreher*, 302 Ill. 50, 54). Without the express authority granted by the act relating to terminable permits the City of Chicago has no power to grant authority to construct, maintain and operate street railways upon its streets and public ways without limiting or fixing any time for the duration of such grant. The Terminable Permit act is the city charter in respect of this particular power, and it has been said by our Supreme Court that the charter of a city bears the same general relation to the ordinances of a city that the constitution of a state bears to its statutes; that a city ordinance which does not comply with a city charter is as invalid as a statute which does not conform with the requirements of a state constitution and when the legislature grants to a municipal corporation power to do any act and prescribes the manner in which the power shall be exercised, the power must be exercised in the manner stated in the grant and not otherwise. (*People v. Mount*, 186 Ill. 560; *City of Carlyle v. Nicolay*, 333 Ill. 562, 568.)

We may go beyond the pronouncement of our Supreme Court and say that the courts are more liberal in sustaining the power of the legislative branch of the state government than that of the city government for the reason that the state has certain inherent powers which the city lacks; that the constitution of the state is a limitation upon its powers while the charter of a city is a grant of powers. In this respect the city charter may be compared to the Constitution of the United States more accurately than with the state constitution. The right of the Congress of the United States to exercise a power must be found in the Constitution just as the right of a city to exercise a power must be found in its charter. The right of a state to exercise its governmental functions exists in all cases except where it is prohibited by the state constitution.

In the present state of the comprehensive traction ordinance, which still remains open for acceptance by the grantee, it seems to us immaterial

whether all the terms and conditions of the grant are contained in one or more ordinances. The act relating to terminable permits provides:

"Sec. 2. No ordinance of any municipality granting a terminable permit shall become operative or effective until a proposition to approve the ordinance shall have been submitted to the electors of such municipality * * *."

* * * * *

While there seems to be a paucity of decisions upon a referendum provision identical with that in the Terminable Permit act, we have come to the considered conclusion that any material amendment to the comprehensive traction ordinance would become part of the original grant of a terminable permit and would have to be submitted to the electors for approval before it could be accepted by the grantee as a binding franchise ordinance.

Since the referendum requirement for every grant of a terminable permit is statutory, the legislature may by a proper enabling act permit the City Council to amend any ordinance granting a terminable permit without requiring such amendment to be approved by the people. (*Waugh v. Glos*, 246 Ill. 604, 607; *Fields v. Lueders*, 274 Ill. 562, 566.)

* * * * *

1930 Traction Ordinance: The comprehensive traction ordinance passed in 1930, pursuant to the Terminable Permit act, was held valid in *People v. Chicago*, 349 Ill. 304 (1932). The local transport companies were incapable of effecting the required reorganization and consolidation; so, in 1934, the City Council refused to grant any further extensions of the date limit for acceptance of the ordinance. Thus the ordinance never went into effect.

EFFECTIVE DATE OF CONSOLIDATED TRACTION ORDINANCE —PENSION PLAN FOR TRACTION EMPLOYEES

(No. 7738—*Commissioner of Public Service—L. H.—September 2, 1932*
—3 pp.)

The Consolidated Traction ordinance of 1930, concerning the consolidation of the elevated railroads and surface lines, will go into effect when the acceptance is filed by the new company, but such acceptance must be filed before January 31, 1933.

The pension and annuity plan provided in the Consolidated Traction ordinance for employees applies to the employees of the new company to be formed and not to employees of existing companies.

Citations:

Ordinances: Coun. J. (1930-31), p. 2980, (Consolidated traction ord., secs. 14, 29-30).
Id. (1931-32), p. 1543.

Expenditures for Traction Expenses: The city may pay out of the appropriation for the office of Corporation Counsel for legal services rendered by attorneys whom the Corporation Counsel had appointed as assistants to act as counsel for a citizen's traction settlement committee in drafting proposed traction bills introduced before the legislature and procuring the passage of the bills.—*Baltzer v. Chicago*, 260 Ill. App. 384 (1931).

FREE TRANSPORTATION FOR SCHOOL TEACHERS

(No. 7193—*Private Individual*—F. J. B.—October 16, 1931—2 pp.)

No traction company is allowed to grant free transportation to any person, nor may the city pay for transportation passes of the city's school teachers out of its corporate funds.

Citations:

Statutes: Cah. '31, 111a: 52-54 (Public Utilities act, secs. 37-39).

(2) *Chicago Rapid Transit Company*

RECTIFYING UNSAFE CONDITION OF ELEVATED RAILWAY

(No. 6888—*Commissioner of Public Works*—C. J. A.—May 4, 1931—3½ pp.)

The unsafe conditions of elevated transit systems, which are under the exclusive jurisdiction of the Illinois Commerce Commission, can be rectified only through an order of the commission.

Citations:

Statute: SH '29, 111½: 61.

Cases: Chicago v. O'Connell, 278 Ill. 591 (1917).

Northern Trust Co. v. Chicago Rys. Co., 318 Ill. 402 (1925).

Chicago Motor Coach v. Chicago, 337 Ill. 200 (1930).

Village of Atwood v. Cincinnati, Indianapolis and Western R. Co., 316 Ill. 425, 431 (1925).

BUS EXTENSIONS FOR RAPID TRANSIT CO.*

(No. 8395—*Mayor*—J. F. G.—May 17, 1934—2 pp.)

The Illinois Commerce Commission has power to consider the application of the Chicago Rapid Transit Company for an extension of its service by means of motor buses to be operated upon the streets and other public ways of the city.

Citation:

Case: Chicago Motor Coach Co. v. Chicago, 337 Ill. 200 (1930).

REMOVAL OF ELEVATED RAILWAY COLUMNS

(No. 7060—*Commissioner of Public Works*—L. H.—August 7, 1931—4½ pp.)

The Illinois Commerce Commission, not the City Council, may exercise the police power to require the Rapid Transit Company to move its supporting columns to conform to street improvements.

Columns of the Rapid Transit Company at the intersection of Ash-

*See annotation "Home Rule Over Local Transport," p. 615.

land and Western avenues in the roadway due to street widening are such a danger and obstruction to traffic as to amount to a public nuisance.

The Chicago Rapid Transit Company, not the city, is liable for the removal of the above columns, and the city will not be liable if it approves the drawings and engineering specifications for removal submitted by the company.

Citations:

- Cases: Village of Atwood v. Chicago, Indianapolis and Western Railroad Co., 316 Ill. 425 (1925).
Chicago v. Chicago City Railway Co., 324 Ill. 618 (1927).

COSTS FOR RELOCATION OF PIERS FOR RAPID TRANSIT CO.

(No. 7510—City Comptroller—M. F. M.—March 24, 1932—1½ pp.)

The removing, shifting or relocating of the valve basins on the north and south line of Van Buren street on Wabash avenue due to the rearrangement and construction of foundations and piers for the Rapid Transit Company, is an obligation of the city.

Citation:

- Ordinance: Coun. J. (1925-26), p. 1269.

MARKET STREET STUB

(No. 6574—Commissioner of Public Works—E. C. H., J. G. D. and J. L.—December 28, 1929—13½ pp.)

Maintenance of the Market Street stub of the Rapid Transit Lines is without legal right and it constitutes a public nuisance in the street; it may be removed in proper legal proceedings by the city.

Inasmuch as the "Market Street stub" is a public nuisance and is maintained in the street without legal right or authority, the city's right to recover the costs of changes in this nuisance, in connection with street improvements, is doubtful.

Citations:

- Ordinances: Lake St. Elevated Ry. ord., Nov. 24, 1890, May 15, 1893, as amended May 22, 1893, Oct. 1, 1894.
Coun. J., April 5, 1914, p. 1440.
Union Consolidated Elevated R. R. ord., June 29, 1896.
Coun. J., June 29, 1922, p. 704 (Market St. widening ord.).

REMOVAL OF WATER TUNNEL OF ELEVATED RAILWAY FOR SEWER PURPOSES

(No. 7311—*Sanitary District of Chicago*—C. J. A.—November 21, 1931—5 pp.)

Where a water tunnel of an elevated railroad company is located in a city street and maintained under the authority of a general ordinance, the city, through its police power, can compel the company to move its tunnel to make room for sewers that are necessary for sanitation purposes.

Citations:

- Ordinances:** Hoover, Spec. Ord. (1915), p. 1228.
 Coun. J. (1927-28), p. 1147 (Sanitary District sewer ord.).
- Cases:** New Orleans Gas Co. v. Drainage Commission, 197 U. S. 453 (1905).
 Union Bridge v. United States, 204 U. S. 364 (1907).
 Chicago, Burlington, and Quincy Railroad v. Drainage Commissioners, 200 U. S. 561 (1906).
 Chicago, Burlington, and Quincy Railroad v. Chicago, 166 U. S. 226 (1896).
 National Water Works Co. v. City of Kansas, 28 Fed. 921 (1886).
 Moore v. New Orleans Water Works Co., 114 Fed. 380 (1902).
 Jamaica Pond Aqueduct Co. v. Brookline, 121 Mass. 5 (1876).
 Matter of Deering, 93 N. Y. 361 (1883).

(3) *Chicago Surface Lines*

Control Over Street Railways: The Illinois Constitution gave the city only the right to decide if and where the railways shall operate. No contract ordinance can abrogate the state's police power over rates, service and safety and the state may recall this power from any agency to which it is delegated. The agreements as to division of net receipts and option to purchase at a set price in the contract ordinance do not affect police powers and are still binding.—*Chicago v. O'Connell*, 278 Ill. 591 (1917).*

MAINTENANCE OF STREETS BY STREET CAR COMPANIES

(No. 8392—*City Council*—J. F. G.—May 16, 1934—2½ pp.)

The matter of maintenance and repair of streets by street car companies must be governed by a contract ordinance and cannot be imposed upon the traction companies by the exercise of police powers.

Citations:

- Ordinances:** Coun. J. (1906-07), pp. 3078, 3124 (Traction ord.).
 Id. (1930-31), p. 2980 (Comprehensive traction ord.).
 Hoover, Spec. Ord. (1915), p. 1682.
- Other reference:** Opinion No. 8332 (this volume, p. 615).

*See annotation "Home Rule Over Local Transport," p. 615.

EXPIRATION OF STREET RAILWAY FRANCHISE—PAVING OBLIGATIONS

(No. 7218—F. J. B.—October 27, 1931—3½ pp.)

Although the surface street railway franchise and the unified operation agreement expired on Feb. 1, 1927, these agreements have been extended by ordinance to Jan. 31, 1932 and the obligation of the Calumet and South Chicago Railway Company to pave or repair its roadbed in Stony Island avenue between 80th and 94th streets remains in full force and effect.

Citations:

Ordinances: Hoover, Spec. Ord. (1915), p. 1395.
Coun. J. (1931-32), p. 513.

PAVING OBLIGATIONS OF SURFACE LINES

(No. 7387—F. J. B.—December 16, 1931—1½ pp.)

The Chicago Surface Lines is obligated to pave the roadbed in Stony Island avenue between Eightieth and Ninety-fourth streets, under the ordinance of March 30, 1908.

Citation:

Ordinance: Hoover, Spec. Ord. (1915), p. 1442.

INVESTMENT OF RESERVE FUNDS OF CHICAGO SURFACE LINES

(No. 8391—Mayor—J. F. G.—May 15, 1934—2½ pp.)

The board of supervising engineers of the Chicago Surface Lines has no power to direct that any of the reserve funds of these companies be invested in tax anticipation warrants of the city.

Citations:

Ordinances: Hoover, Spec. Ord. (1915), p. 1425, sec. 24.
Id., p. 1560, sec. 22.
Id., p. 1730, sec. 4.

ACCRUED INTEREST OF SURFACE LINES' RENEWAL AND DEPRECIATION FUND

(No. 8550—Chairman, Committee on Local Transportation—J. F. G.—November 1, 1934—2½ pp.)

Accrued interest of funds of the Chicago Surface Lines set aside for renewal and depreciation may not be used for extensions or for maintenance and repairs but only for renewals, which are defined in

the traction ordinances to be the replacement of any principal part of the street railways, or of their equipment or appurtenances.

Citation:

Ordinance: Hoover, Spec. Ord. (1915), p. 1498, sec. 16.

ATTORNEY'S FEES FOR SECURING TRACTION GRANT

(No. 7318—Board of Supervising Engineers—L. H.—November 24, 1931—5½ pp.)

Such items as attorney's fees in and about securing a new traction grant are not properly chargeable to the operating account which was set up under the provisions of the traction ordinances of 1907.

Citations:

Ordinances: Coun. J. (1906-07), p. 3078.

Id. (1930-31), p. 2988.

Other reference: Op. Corp. Counsel (1926-27), p. 496.

CHICAGO CITY RAILWAY RECEIVERS' FEES AND EXPENSES

(No. 7429—Member, Board of Supervising Engineers—J. F. G.—January 22, 1932—2 pp.)

The franchise ordinance of 1907 to the Chicago City Railway Company makes no express provision for the payment of receivers' fees or the legal expenses of receivers from the joint account of the city and the Railway Company. These items should be held in a suspense account pending the decision of the Federal Court in the Chicago Railways case.

OPERATION OF ONE-MAN STREET CARS

(No. 7148—City Council—J. F. G. and F. J. B.—September 26, 1931—3 pp.)

If the Illinois Commerce Commission should modify its order of December 30, 1920, relating to one-man cars, so as to permit the Chicago Surface Lines to extend the one-man car operation from time to time, that action would permit the Chicago Surface Lines to determine without supervision or interference when and where one-man cars may more adequately, efficiently and safely serve the public.

COST OF LIGHTING SAFETY ISLANDS

(No. 8610—Chairman, Subcommittee on Finance—M. H. F.—January 2, 1935—6 pp.)

The installation and maintenance of safety islands and zones is of benefit not merely to the users of street cars, but also to pedestrians

and motorists. Thus, the Chicago Surface Lines probably cannot be charged for lighting such safety islands and loading platforms and such expense should be borne by the city as it is a general corporate purpose.

Citations:

- Ordinances:** Coun. J. (1925-26), p. 1587.
Id. (1926-27), p. 4920, 5728.
Id. (1906-07), pp. 3078, 3100 (Traction fund ord., sec. 25).
Uniform traffic code, art. 8, sec. 77(b).
Case: Barsaloux v. Chicago, 245 Ill. 598 (1910).

SURFACE LINES' POWER TO MAKE DRIVEWAY CONNECTIONS

(No. 6491—*Board of Local Improvements—F. J. C.—August 13, 1929—5 pp.*)

The Surface Lines have express authority to make such connections with their property and their tracks as is necessary for the successful operation of their business.

A special Council order is essential to the maintenance of a driveway by the Surface Lines, when the driveway is not necessary for use in connection with their business.

Citations:

- Ordinances:** Code '22: 3565-66.

REMOVAL OF ABANDONED STREET CAR TRACKS

(No. 7968—*Commissioner of Public Works—C. N.—March 14, 1933—4½ pp.*)

Where the abandoned tracks and ties of the old General Electric Railway Company constitute a menace to public safety, the duty to remove them devolves on the city; the Chicago City Railway Company, which succeeded to the rights of the General Electric Railway, assumed liability only for those tracks which it used.

Citations:

- Ordinances:** Coun. J. (1895-96), p. 1654.
Id. (1891-97), p. 1510.
Id. (1906-07), pp. 2915, 3078.

EFFECT OF PROPOSED STREET RAILWAY EXTENSION ORDINANCE

(No. 8055—*Chairman, Committee on Local Transportation—J. F. G.—May 13, 1933—5 pp.*)

The passage of the proposed ordinance for a street railway viaduct at East Roosevelt road will prevent the construction of a park ap-

proach viaduct free of transportation lines, unless provision is made for a subway. Construction of this subway is not obligatory on the city or its licensees, but only permissive. If the subway is not constructed, provision will have to be made for street railways upon the viaduct when built. To this extent the passage of the proposed street railway extension ordinance will impair the rights of the parties involved in the lake front development ordinance of 1919.

Citation:

Ordinance: Coun. J. (1919-20), p. 969, sec. 5(f), sec. 6(c), schedule II, specification B, plan K.

(4) *Buses*

REGULATION OF MOTOR BUSES

(No. 7037—*Chairman, Committee on Traffic and Public Safety—C.J.A.—July 30, 1931—2½ pp.*)

Motor buses are public utilities subject to the exclusive regulation of the Illinois Commerce Commission in the matter of their equipment, such as overhead exhausts, as well as in the conduct of their business.

Citations:

Case: Chicago Motor Coach Co. v. Chicago, 337 Ill. 200 (1930).

FRANCHISE FOR CHICAGO MOTOR COACH CO.*

(No. 8371—*Chairman, Local Transportation Subcommittee—M. H. F.—April 20, 1934—4 pp.*)

The Chicago Motor Coach Company, having procured a certificate of convenience and necessity from the Illinois Commerce Commission, is not required to obtain a franchise from the city since the commission was vested with exclusive jurisdiction over the subject matter, and the powers previously exercised by the city in this regard were withdrawn.

Citations:

Administrative orders: Public Utilities Commission: Orders of Jan. 15, 1917 and Apr. 30, 1917 to Chicago Motor Bus Co.

Permission to Operate: By the creation of the Illinois Commerce Commission with comprehensive powers over public utilities, the city's power to regulate buses has been withdrawn and the city has no power to compel a bus company, which has obtained a certificate of convenience and necessity from the commission, to secure a grant of authority to operate on the streets from the city.—Chicago Motor Coach Co. v. Chicago, 337 Ill. 200 (1929).

Opinion No. 6546 of November 18, 1929, to the Commissioner of Police discusses the same point as the above case.

*See annotation "Home Rule Over Local Transport," p. 615.

PASSENGER BUS COMPENSATION FOR USE OF STREETS

(No. 8223—Chairman, Subcommittee on Local Transportation—M. H. F.—November 21, 1933—4½ pp.)

The city has no power to enact an ordinance which would exact substantial compensation from passenger buses for the use of its streets. The city wheel tax ordinance may be amended to increase the annual fee by a reasonable amount, graduating it in accordance with the weight and load, but it must apply to all motor trucks, coaches and buses, and not only to passenger buses.

Citations:

Statutes: SH '33, 24: 65.8, 65.19, 65.95.
Id., 121: 227.

Ordinance: Code '31: 2066.

Cases: Ferguson Coal Co. v. Chicago, 343 Ill. 20 (1931).
Chicago v. Foley, 335 Ill. 584 (1929).
Melton v. City of Paris, 333 Ill. 190 (1929).
Harder's Fire Proof Storage Co. v. Chicago, 235 Ill. 58 (1908).
Ayres v. Chicago, 239 Ill. 237 (1909).
Chicago Motor Coach Co. v. Chicago, 337 Ill. 200 (1930).

BUS LINE WITHOUT CERTIFICATE OF CONVENIENCE AND NECESSITY

(No. 7206—Alderman, 50th Ward—F. J. B.—October 22, 1931—2 pp.)

The Illinois Commerce Commission has exclusive power to regulate and control a motor vehicle that is a public utility and if a bus line is a common carrier and is operating without a certificate of convenience and necessity from the Illinois Commerce Commission, the city or any interested local organization may file a formal complaint with the Illinois Commerce Commission.

Citations:

Statutes: Cah. '31, 111a: 72, 76.

Case: Austin Brothers Transfer Co. v. Bloom, 316 Ill. 435 (1925).

SEATING OF PASSENGERS ON MOTOR BUSES

(No. 7544—Alderman, 46th Ward—F. J. B.—April 14, 1932—2 pp.)

The power to enforce a regulation prohibiting motor buses from taking on passengers when there are no vacant seats is vested exclusively in the Illinois Commerce Commission.

Citations:

Statute: Cah. '31, 111a: 64.

Cases: Village of Atwood v. Cincinnati, Indianapolis, and Western Railroad Co., 316 Ill. 425 (1925).
Chicago Motor Coach Co. v. Chicago, 337 Ill. 200 (1930).

BUSES OPERATING BETWEEN HOTELS AND WORLD'S FAIR

(No. 8048—*Commissioner of Police—Jud. G.—May 9, 1933—4 pp.*)

Buses which operate between hotels and the grounds of the World's Fair must obtain a certificate of convenience and necessity from the Illinois Commerce Commission and must pay the additional license fee required by sec. 9a of the Motor Vehicle act.

Citations:

Statutes: SH '29, 111 $\frac{2}{3}$: 8, 10, 81.
Id., 121: 2, 9a.

**BOND AND INSURANCE REQUIREMENTS FOR
MOTOR VEHICLES**

(No. 8203—*Commissioner of Police—M. H. F.—November 4, 1933—4 pp.*)

In order that a motor vehicle may come within the provision of the Illinois Motor Vehicle act which requires the filing with the Secretary of State of a bond or policy of insurance to indemnify passengers against injury, it must operate for hire upon the city's streets and accept and discharge without discrimination all persons who offer themselves for transportation. Funeral and livery cars, operated only to carry passengers at funerals, are not subject to this provision.

Automobiles, which pick up passengers in the city and transport them to other states, and which do not have certificates of convenience and necessity from the Illinois Commerce Commission, are not subject to the provision of the Illinois Motor Vehicle act which requires the filing with the Secretary of State of a bond or policy of insurance to indemnify passengers against injury, but are subject to the State Public Utilities act, and come under the exclusive jurisdiction of the Illinois Commerce Commission.

Citations:

Statutes: Illinois Motor Vehicle act, sec. 42a.
SH '33, 111 $\frac{2}{3}$: 57.
Cases: Weksler v. Collins, 317 Ill. 132 (1925).
People v. Barbuas, 230 Ill. App. 560 (1923).

Opinion No. 8422 of June 6, 1934, to the Commissioner of Police is in accord with the above opinion.

INSURANCE REQUIREMENTS FOR SIGHTSEEING VEHICLES

(No. 8483—*Public Vehicle License Commissioner—J. F. G.—August 3, 1934—2 $\frac{1}{2}$ pp.*)

Each sightseeing vehicle in Chicago must file an insurance policy for \$2,500 for injuries to, or the death of, any one person and the policy may provide for a maximum liability of \$100,000 for any one

accident. A policy which is limited to a loss in excess of \$10,000 and up to \$25,000 for an injury to or the death of one person and up to \$50,000 for an injury to or the death of more than one person does not comply with the ordinance.

Citation:

Ordinance: Code '31: 2078, as amended June 13, 1934.

VEHICLE LICENSE FOR BUSES FROM OUTSIDE CITY

(No. 8078—*M. H. F.*—May 23, 1933—1½ pp.)

Buses from outside the city which are licensed under the State Motor Vehicle act may bring passengers into the city and return them to their starting points without being licensed under the city's ordinances. But, if those buses are operated for hire within the city, they must be licensed under the city's wheel tax and public vehicle ordinances.

FOREIGN STATE BUSES DOING LOCAL BUSINESS

(No. 8071—*Assistant Engineer, Division of Franchises, New York City*—*M. H. F.*—May 20, 1933—2½ pp.)

When omnibuses which carry passengers into the city from states other than Illinois, engage in Chicago in a local business for hire, they are subject to the registration provisions of the State Motor Vehicle act and to the city's wheel tax ordinance.

Citations:

Ordinance: Code '31: 2077-2092.

Cases: Hendrick v. Maryland, 235 U. S. 610 (1915).

Clark v. Poor, 274 U. S. 554 (1927).

Sprout v. City of South Bend, 277 U. S. 163 (1928).

Continental Baking Co. v. Woodring, 52 S. Ct. 595 (1932).

FOREIGN STATE BUSES OPERATING IN CITY DURING FAIR

(No. 8036—*Commissioner of Police*—*M. H. F.*—April 28, 1933—5½ pp.)

Motor buses which are brought from outside of Illinois to Chicago for the period of the Century of Progress Exposition and are used to carry passengers for hire within Chicago, are subject to the state and city vehicle registration and license laws and ordinances.

Buses which operate as public utilities over regular routes require authority from the Illinois Commerce Commission.*

Citations:

Statute: SH '31, 121: 221.

Ordinance: Code '31: 2065.

Cases: Chicago Motor Coach Co. v. Chicago, 337 Ill. 200 (1930).

Austin Bros. Transfer Co. v. Sloan, 316 Ill. 435 (1925).

*See annotation "Home Rule Over Local Transport," p. 615.

*(5) Chicago Tunnel Company***USE OF TUNNELS FOR STEAM TRANSMISSION**

(No. 8613—Chairman, Sub-Committee of the Committee on Utilities—J. F. G.—January 4, 1935—8 pp.)

The Chicago Tunnel Company is given no right under the ordinance by which it leased certain tunnels from the city to allow the use of these tunnels for the transmission of steam. Since the installation of the steam pipes by the company makes impossible the maintenance of freight service in the tunnels, the city, under the terms of its agreement, can terminate the ordinance, if the company does not remove the pipes within sixty days after notice is given.

Citations:

Ordinance: Coun. J. (1932-33), p. 2731.

Cases: Blocki v. People, 220 Ill. 444 (1906).

People v. Wyand Light Co., 306 Ill. 377 (1923).

Other reference: Webster's Dictionary, "merchandise."

OPINION OF FOREGOING SYNOPSIS

We have your letter of October 26, 1934, in which you request our opinion as to the right and authority of the Chicago Tunnel Company, under the ordinance passed July 19, 1932 (C. J. 2731-2739), to make use of the tunnels for the transportation or transmission of steam in the manner indicated in the report of the Commissioner of Public Works.

It indicates that the Chicago Tunnel Company has installed steam pipelines as a part of its tunnel system for the transmission of steam for the Chicago Steam Corporation which has a contract with the Union Station Company for its supply of live steam and with individual users for their steam requirements. About eight customers of the Chicago Steam Corporation are so served.

The pipelines installed by the Chicago Tunnel Company are connected with steam lines of the Union Station Company at a point under Jackson boulevard just west of the Chicago river from which point there is an 8-inch steam pipeline on the floor of the tunnel extending eastward under Jackson boulevard to a point approximately half way between LaSalle and Clark streets and from the end of said 8-inch steam pipeline a 4-inch steam pipeline extends on the floor of the tunnel eastward for about a half block. The Chicago Tunnel Company also has a 4-inch steam pipeline extending on the floor of its tunnels from Jackson boulevard northward in Franklin street to a point about half way between Adams and Monroe streets. In those parts of the tunnels described where the steam pipelines have been installed the tunnel is no longer available for the transportation of bulk freight, package and parcel freight or merchandise in the cars operated by the Chicago Tunnel Company.

The Chicago Steam Corporation was organized under the laws of Illinois and is affiliated with the Chicago Tunnel Company. It has pending an application before the Illinois Commerce Commission for a certificate of public convenience and necessity to operate as a public utility.

As indicated in your communication the Chicago Tunnel Company maintains and operates its tunnel system by virtue of an ordinance passed July 19, 1932, entitled "An ordinance granting permission to Chicago Tunnel Company to construct, maintain and operate a tunnel system and to use and

occupy existing tunnels of the City of Chicago, together with extensions thereof, additions thereto and substitutions thereof" (C. J. 2731). By the terms of that ordinance the city leased to the Chicago Tunnel Company existing tunnels described therein and indicated by a map attached to said ordinance as exhibit A. The term of the lease is for thirty years. The Chicago Tunnel Company is required to pay as rent and compensation for the use and occupancy of such tunnels a sum of money equal to three cents per car of bulk freight and three cents per ton for package or parcel freight handled by means of the tunnel system and six per cent of the gross receipts of the Chicago Tunnel Company derived from any other use of the tunnels (section 11, C. J. 2735).

Section 2 of the ordinance referred to is in part as follows:

"Subject to the conditions and limitations of this ordinance, permission and authority are hereby granted to the company to establish, construct, reconstruct, maintain and operate a tunnel system for a term of thirty (30) years from and after the passage of this ordinance," etc.

The words "tunnel system" are defined in subdivision (e) of section 1 of the ordinance as follows:

"(e) The words 'tunnel system' mean all tunnels and extensions thereof and connections therewith to and upon private lands and buildings and all tracks, rolling stock, cars, carriers, pneumatic tubes, containers, electric motors, devices for the propulsion of cars, pipes, trolley lighting system and all other apparatus, equipment and appurtenances used or useful for the conveyance, transportation, transmission, receipt and delivery of all kinds of bulk freight, package and parcel freight, merchandise and mailable matter, and include the business of a common carrier through the tunnels (but not for the conveyance or transportation of passengers);"

A grant by a city must be construed most strongly against the grantee and in favor of the public. It should be interpreted according to the language used and in the light of all the facts and circumstances surrounding the case. (*Blocki v. The People*, 220 Ill. 444.)

At the time the ordinance of July 19, 1932, was passed the Chicago Tunnel Company for a great many years had been engaged in the transportation of bulk freight such as coal, ashes, debris and materials from excavations, package freight and merchandise such as is sold in stores in the business district of Chicago. All of this kind of bulk freight, package freight and merchandise was transported through the tunnels by means of small cars upon tracks laid in the tunnels and operated by electric power. The Chicago Tunnel Company at one time also had installed in the tunnels pneumatic tubes for the transmission of mail ultimately handled by the United States post office and communications between news gathering agencies and certain newspapers. It was undoubtedly the intention of the City Council to cover the character of business then being conducted by Chicago Tunnel Company, or which theretofore, had been conducted by that company, when it defined the words "tunnel system" which the City Council authorized the company to establish, maintain and operate.

The City Council never intended to authorize the Chicago Tunnel Company to engage in the business of transmitting steam by private contract or as a common carrier or otherwise. This is emphasized by the language in section 10 of the ordinance authorizing the company to sublet or permit the use of space in the tunnels to other public service agencies for any public service subject to the consent of the City Council.

The limitations under this ordinance upon the use of the tunnels for any purpose other than the transportation of bulk freight, package and parcel freight, merchandise and mailable matter are clearly expressed in the ordinance. A clear distinction is made between the tunnels under the streets

of the City of Chicago which are used by Chicago Tunnel Company and the tunnel system of the Chicago Tunnel Company which includes the tunnels and all the appurtenances and equipment of the Chicago Tunnel Company used or useful in its business as a common carrier of bulk freight, package and parcel freight, merchandise and mailable matter. The "tunnels" may be used for any public service other than the transportation of bulk freight, package and parcel freight, merchandise and mailable matter by a lessee or permittee of the Chicago Tunnel Company subject to the consent of the City Council, but not by the Chicago Tunnel Company itself. The "tunnel system" may be maintained and operated by the Chicago Tunnel Company only for the purpose of conveying, transporting, transmitting, receiving and delivering bulk freight, package and parcel freight, merchandise and mailable matter and not to carry on any other public service. The "tunnel system" includes the business of a common carrier but the common carrier business which is authorized is limited to bulk freight, package or parcel freight, merchandise and mailable matter. Steam, in our opinion, does not fall within any of the classes of articles authorized to be conveyed, transported, transmitted, received and delivered. It is certainly not bulk freight. It is certainly not package or parcel freight, and it is certainly not mailable matter. The only question which has arisen in connection with the transportation and transmission of steam through the tunnels of the Chicago Tunnel Company is whether steam is merchandise within the meaning of the ordinance authorizing the Chicago Tunnel Company to engage in the business of a common carrier for the transportation, transmission, receipt and delivery of merchandise.

Merchandise is defined by Webster as "the objects of commerce; whatever is usually bought or sold in trade, or market, or by merchants; wares; goods; commodities." Steam is generated for heating or power purposes and is used for the energy therein. When sold it is in the nature of the rendition of a service for compensation. It is not an object of commerce. That is, it is not usually bought or sold in trade or market or by merchants.

In *People v. Wyand Light Co.*, 306 Ill. 377, at page 381 the court approved the definition of merchandise in the Century Dictionary as follows:

"any movable object of trade or traffic; that which is passed from hand to hand by purchase or sale; specifically the object of commerce; a commercial commodity or commercial commodities in general; the staple of a mercantile business; commodities, goods or wares bought and sold for gain."

It will be observed that the ordinary use and meaning of the word "merchandise" is such commodities as are the objects of trade and commerce by those engaged in a mercantile business. The Chicago Tunnel Company is a public utility and the Chicago Steam Corporation has an application pending before the Illinois Commerce Commission to operate as a public utility. Neither corporation is engaged in a mercantile business and does not buy or sell merchandise within the ordinary meaning of that term.

In *People v. Wyand Light Co.*, *supra*, the court said (306 Ill. 381):

"Corporations for purely mercantile purposes are well understood by the people in general. They form quite a large class of corporations and are very different in character from corporations known as public utilities."

It is clear from the language employed in the ordinance and the facts surrounding the case at the time of the adoption of the ordinance that the Chicago Tunnel Company may not use the tunnels for the transmission of steam and that the installation of the pipelines by the Chicago Tunnel Company, which rendered those parts of the tunnels where the pipelines have been installed no longer available for the movement of the cars of the Chi-

ago Tunnel Company, is a breach of the agreement of the company of the following provision of its grant:

"Section 12. The Company shall, during the term of this ordinance, maintain, operate and use the tunnel system, for the purpose of conveying, transporting, transmitting, delivering and moving such property as may be tendered to it for such purposes, to the extent of the reasonable demand for service within the capacity of the tunnel system. * * * " (Coun. J. 2735.)

By the action of the Chicago Tunnel Company it has divested itself of its ability to render the transportation service which may be required upon demand of the occupants of property in the vicinity of that part of the tunnels in which steam pipelines have been located. Under these circumstances the city may give notice to Chicago Tunnel Company, under section 14 of the ordinance, that it has defaulted in the performance of that part of section 12 of the ordinance above quoted and that unless the steam pipelines referred to are removed from the tunnels within six months the city, by its City Council, will terminate the ordinance granting permission to Chicago Tunnel Company to construct, maintain and operate a tunnel system and to use and occupy existing tunnels of the City of Chicago, together with extensions thereof, additions thereto and substitutions thereof passed by the City Council on July 19, 1932.

EFFECT OF PROPOSED TUNNEL ORDINANCE*

(No. 7655—Committee on Gas, Oil and Electricity—J. F. G.—July 18, 1932—3 pp.)

The city acquired absolute ownership of certain tunnels by a prior tunnel ordinance and the proposed ordinance to reimburse the Chicago Tunnel Company for reconstructing the tunnels does not give the company any property rights other than as lessee.

The proposed tunnel ordinance in no way affects the obligations imposed on the Illinois Bell Telephone Company by the ordinance of July 20, 1931 to bear its proportionate share of the cost of relocating its equipment in the streets when a subway is constructed.

Citation:

Ordinance: Coun. J. (1931-32), p. 709.

COMPENSATION DUE CITY UNDER TUNNEL ORDINANCE

(No. 8224—City Comptroller—J. F. G.—November 22, 1933—2½ pp.)

In the ordinance of July 19, 1932, granting rights to the Chicago Tunnel Company, the City Council intended the three per cent minimum provision to cover only the gross receipts of the Chicago Tunnel Company, even though there might be an arbitrary division of revenue between that company and the Chicago Warehouse and Terminal Company.

Citations:

Ordinance: Coun. J. (1932-33), p. 2731 (Chicago Tunnel Co. ord., secs. 1, 11, 20).

*See Opinion No. 7939, p. 705, on tax assessment of tunnel rights.

COMPENSATION FOR TUNNEL CONNECTIONS

(No. 8348—*Superintendent of Compensation—J. F. G.—March 30, 1934—2 pp.*)

The city is not entitled to any compensation for the connection of private property with tunnels that have been leased to the Chicago Tunnel Company.

Citations:

Ordinance: Coun. J. (1932-33), p. 2731.

Other reference: Opinion No. 7983 (this page).

**COMPENSATION FOR TUNNEL COMPANY'S USE OF
ASH CHUTE**

(No. 7983—*City Comptroller—J. F. G.—March 27, 1933—2 pp.*)

The ordinance provision of 1927 granting permission to the Chicago Tunnel Company to use the ash chute, and providing for annual compensation to the city is no longer effective and the warrant for collection should be cancelled.

Citations:

Ordinances: Coun. J. (1926-27), p. 3356.

Id. (1932-33), p. 2731 (Chicago Tunnel Co. ord.).

CITY'S CLAIM FOR TUNNEL REPAIR

(No. 6682—*Commissioner of Public Works—C. J. A.—May 27, 1930—3 pp.*)

The city has no claim against a tunnel company for the cost of repairs necessitated by finding a ventilating pipe running through a sewer, the pipe having been placed there in connection with the construction of the tunnel by a company which has been out of existence for about twenty years, if the present tunnel company has never used or occupied the tunnel. If the present company had used the tunnel, it would have maintained a continuing nuisance.

The city's claim for damages against the company which built the tunnel is barred by the Statute of Limitations, and the purchaser of the company against which the claim existed is also protected by the Statute of Limitations, though the purchase was made subject to all valid and existing claims.

C. ELECTRICITY, GAS AND TELEPHONE

POWER TRANSMISSION FOR PUBLIC OR PRIVATE USE

(No. 7670—L. H.—July 27, 1932—2½ pp.)

Private parties may generate power on their own land and use it there, but if power is to be distributed to the public generally or a public highway is to be used for purposes of transmission, a certificate of convenience and necessity must be obtained from the Illinois Commerce Commission. Such certificate will be issued if it is shown that the necessities or convenience of the public demand the service.

Citations:

Statutes: SH '31, 32: 2.
Id., 111½: 10, 56.

CITY'S PRIVILEGES AS PUBLIC UTILITY CUSTOMER— CHANGES IN ELECTRICITY SERVICE

(No. 8408—Commissioner of Public Service—E. L. M.—May 25, 1934—5 pp.)

In the absence of statutory or ordinance provision to the contrary, the city is in the same status, with regard to service furnished it by a private utility company, as that of any other consumer of the company.

No statutory or ordinance specifications exist as to what type of electric current must be furnished to consumers, and a utility company is acting within its legal rights when it changes from direct to alternating current, if such change has been approved by the Illinois Commerce Commission.

Citations:

Cases: Hunt v. Marianna Electric Co., 114 Ark. 498 (1914).
Earl Carroll Realty Corp. v. New York Edison Co., 252 N. Y. S. 538 (1931).

ERECTION OF TRANSMISSION LINES AND TOWERS—INTER- STATE TRANSMISSION OF POWER

(No. 6457—Aldermen, 10th Ward—J. G. D.—June 21, 1929—8 pp.)

Towers and wires erected for the transmission of electricity are structures, and a utility company has no right to construct such towers and wires on its property within a residence zone without a permit from the Commissioner of Buildings. The Commissioner of Buildings

should issue a permit only if the erection of towers and wires will not seriously injure the appropriate use of neighboring property.

Lines for the transmission of power from one state to another are not under the jurisdiction of the Interstate Commerce Commission.

Citations:

- Constitution:** Illinois, art. IX, sec. 4.
Ordinances: Hoover, Spec. Ord. (1915), p. 86.
 Zoning ord., secs. 4, 13, 28.
 Code '22: 413, 432, 433.
Statutes: Cah. '27, 24: 527 (Zoning act).
 SH '27, 114: 20 (Railroads and Warehouses).
 Code Laws of the United States, pp. 1630, 1631.
Cases: Chicago and Western Indiana R. R. v. Dunbar, 100 Ill. 110 (1881).
 Tudor v. Rapid Transit R. R., 154 Ill. 129 (1894-95).
 Forbes v. Willamette Falls Electric Co., 19 Ore. 61, 23 Pac. 670 (1890).
Other reference: 1 Words and Phrases 889.

COST OF REMOVING PUBLIC UTILITY STRUCTURES*

(No. 7551—*Commissioner of Public Works—Jud. G.—April 16, 1932—3 pp.*)

The city is not liable for the expense incurred by the Commonwealth Edison Company in removing its poles and conduits to allow the installation of a water main, as in so acting the city performed in its governmental capacity to protect public health and to guard against fire, and the company is bound to observe these prior rights of the city under the terms of the grant to the company.

Citation:

Ordinance: Coun. J. (1897-98), p. 477.

DAMAGE TO PUBLIC UTILITY PROPERTY

(No. 8324—*Chairman, Committee on Finance—E. L. M.—March 12, 1934—2 pp.*)

The city has prior rights in the use of streets and under an express provision of an ordinance, the Commonwealth Edison Company must sustain the loss occasioned by the necessary extension of a water main. However, the city must notify the utility company of its plan and thus provide an opportunity for the readjustment of the company's conduits and wires or be liable for any cost beyond that which the company would have been put, had it been allowed to make the necessary adjustments.

*See also Opinion No. 7309, p. 680.

CHARGES FOR SUBMETERED ELECTRIC CURRENT

(No. 8192—C. N.—October 16, 1933—1½ pp.)

No law or ordinance requires submetering companies to charge for electrical current at the retail rate of the Commonwealth Edison Company.

PRESSURE AND QUALITY OF GAS ON DOMESTIC SERVICE LINE

(No. 8194—F. J. B.—October 19, 1933—1½ pp.)

The pressure and quality of gas to be maintained on domestic service lines is controlled by the Illinois Commerce Commission.

Citations:

Administrative orders: Illinois Commerce Commission, Gen. ord. 66, Rule XVIII; Interlocutory ord. of Oct. 1, 1931.

PUBLIC UTILITY'S LIABILITY FOR DAMAGE DUE TO UTILITY REPAIRS IN STREETS*

(No. 8818—Commissioner of Public Works—E. L. M.—July 17, 1935—3 pp.)

The People's Gas Light and Coke Company is liable for injury caused to property by its failure to restore properly the street pavement which it had torn up to make repairs.

Citation:

Ordinance: Code '31: 739, 740.

USE AND OCCUPANCY OF STREETS BY TELEPHONE COMPANIES

(No. 7033—Mayor—W. H. S., F. X. B., J. F. G. and H. M. D.—July 29, 1931—38 pp.)

The ordinance of June 20, 1931, giving the Illinois Bell Telephone Company the power to construct, maintain and operate a telephone system in the city, is a valid exercise of the powers remaining in the city with respect to the use and occupancy of its streets and public places by telephone companies and it does not contravene the Public Utility act nor the powers of the Illinois Commerce Commission; yet,

*See also opinions on p. 653, and Opinion No. 7529, p. 680.

it reserves to the city all extensions of powers which may be acquired by future legislative acts.

Citations:

- Ordinances:** Coun. J. (1907-08), vol. 2, p. 3109.
Id. (1931-32), p. 709.
- Statutes:** Ill. Laws (1913), p. 459.
Id. (1921), p. 702.
- Cases:** Chicago v. O'Connell, 278 Ill. 591 (1917).
Chicago Railways Co. v. Chicago, 292 Ill. 190 (1920).
Hoyne v. Chicago and Oak Park Elevated Railroad Co., 294 Ill. 413 (1920).
Village of Atwood v. Cincinnati, Indianapolis and Western Railroad Co., 316 Ill. 425 (1925).
Chicago, North Shore and Milwaukee Railroad Co. v. Chicago, 331 Ill. 360 (1928).
Chicago Motor Coach Co. v. Chicago, 337 Ill. 200 (1930).
Springfield v. Interstate Telegraph Co., 279 Ill. 324 (1917).
Central Illinois Public Service Co. v. Schwartz, 284 Ill. 108 (1918).

COMPENSATION DUE CITY BY TELEPHONE COMPANY

(No. 6811—*Chairman, Committee on Finance—L. J. G. and J. L.—December 15, 1930—7½ pp.*)

The city can successfully maintain a suit against the Illinois Bell Telephone Company for the full amount of the compensation due to the city at this date under the expired franchise ordinance of 1907, as amended, and the extensions of it, as well as for the time not covered by the extensions.

Citations:

- Ordinances:** Hoover, Spec. Ord. (1915), p. 1826.
Coun. J. (1928-29), p. 4209.
Id. (1930-31), p. 2949.
- Cases:** Clapp v. Noble, 84 Ill. 64 (1876).
Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151 (1881).
Keegan v. Kinnare, 123 Ill. 280 (1887).
- Other reference:** 4 McQuillin, Mun. Corp. (2d ed.) 744.

DEPOSIT CHARGE FOR TELEPHONE INSTALLATION

(No. 6654—*B. J. K.—April 28, 1930—1 p.*)

There is nothing in the ordinance of the city to prevent the telephone company from making a fifteen dollar deposit charge for the installation of a telephone.

TELEPHONE EQUIPMENT FOR RECEIVING CALLS IN POLICE AND FIRE STATIONS

(No. 7784—Commissioner of Public Service—J. F. G.—October 19, 1932—3 pp.)

By the ordinance of July 20, 1931, authorizing the Illinois Bell Telephone Company to construct, maintain, and operate a telephone system, the city intended that the company must furnish equipment for receiving without charge calls at the police and fire headquarters and stations.

Citation:

Ordinance: Coun. J. (1931-32), p. 709, sec. 8 (Illinois Bell Telephone Co. ord.)

Opinion No. 7376 of December 14, 1931, to the Commissioner of Police also deals with telephone equipment for police stations.

COMPUTATION OF FREE CITY TELEPHONE MESSAGES

(No. 7419—Commissioner of Public Service—J. F. G.—January 16, 1932—2 pp.)

The computation of the number of free city telephone messages in each year should be made by adding 2,000,000 to the number by which the number of phones in service in Chicago on the first of the year exceeded the number in service on the date of the passage of the telephone ordinance.

Citation:

Ordinance: Coun. J. (1931-32), p. 709.

CHAPTER X

USE OF STREETS AND OTHER PUBLIC WAYS

INTRODUCTORY

Regulating the use of streets and other public ways involves control over passenger and pedestrian traffic, transportation of goods and services, and special uses or encroachments upon public thoroughfares. For Chicago, a lake port and river city, it also encompasses questions of maritime traffic and uses.

The regulation and maintenance of public ways is no small task. In 1934, there were almost a million tons of local and lake traffic in the Chicago river and over 429,000 motor vehicles registered in the city. Within the city there are over 3,600 miles of streets and almost 2,000 miles of alleys. If figures were available for the volume of vehicle and pedestrian traffic on public ways of the city, they would show even more forcefully the highly intensive use these public thoroughfares receive.

In regulating public streets, the state exercises a primary jurisdiction. It has the power to take over any street in the city as a state highway, and exercises an extensive control over traffic. By statute, it regulates such subjects as traffic signals, reckless driving, right of way, parking, and the size and weight of vehicles. Where there is a state statute, the city can establish regulations on the subjects only in conformity with, and within the limits set by, the state law.

Certain powers still remain with the city. By virtue of the motor vehicle act, the city retains the power to regulate parking, to regulate traffic by means of police officers or traffic signals, to regulate processions and assemblages on the highways, to designate particular highways as one-way streets, to designate through streets and require vehicles to stop before crossing them, and to regulate in a limited manner the size and weight of vehicles.

A most significant recent development in the regulation of the use of public ways has been the enactment in 1935 of a new state Uniform Traffic Code. Thus, many of the specific points decided in the opinions of this chapter will have to be revised in the light of this new code. Nevertheless, the underlying principles of regulation expressed herein are still valid.

Another major development has been the state delegation to the city by a 1935 act of the power to inspect motor vehicles. By virtue

of this act, the city has set up a large number of inspection stations and requires all motor vehicles to be inspected and approved as to mechanical efficiency.

In addition to traffic regulation, the special use of streets is another important urban problem. The basic principle here is that public ways cannot be encroached upon for private purposes so as to interfere with their normal use by the public. Thus, we have legal questions about the establishment of stands upon streets, advertising in streets, and the building of tunnels and vaults under streets.

Chicago, as a lake port and river city, is also concerned with the use of water ways. Here the United States exercises supreme jurisdiction by virtue of the Constitution. However, where the federal government has failed to exercise its jurisdiction, the state government may step in and enact police regulations. Furthermore, certain powers in this sphere have been delegated to the city. The subjects of police regulation of, as well as construction and maintenance of, water ways is discussed near the close of this chapter.

Although this chapter gives primary emphasis to police powers, it also deals with the creation, construction, maintenance, and vacation of public ways. Although these are not police problems, they are integrally related to a discussion of the subject of public ways.

A. STREETS, ALLEYS, AND SIDEWALKS

(1) *Creation And Vacation*

ESTABLISHMENT OF PUBLIC WAYS

(No. 8915—*Commissioner of Public Works—J. J. S.—November 7, 1935—2½ pp.*)

Three ways to establish public highways are by prescription, dedication, or condemnation under power of eminent domain.

To establish a public highway by prescription, there must be adverse and continuous travel over such highway by the public for at least 15 years; prescriptive title in a highway is merely the easement that the public acquires.

If an undedicated portion of a street has not been established as a public highway by prescription, it should be condemned under the Local Improvement act to establish it as such.

Citations:

Statute: ISBS '35, 121: 153.

Case: Koch v. Mraz, 334 Ill. 67 (1929).

OPINION OF FOREGOING SYNOPSIS

In your letter of June 21, 1935, you call attention to the fact that the east half of South Normal avenue between West 33rd street and West 35th street has never been dedicated, that a portion of this east half extending from 35th street for 400 feet north was paved many years ago and that a viaduct approach was built on this 400 foot portion. Your letter and the plat attached to the letter reveal the fact that the remainder of this east half of South Normal avenue has been and is now fenced in. You state that:

"Although the east half of this street has not been dedicated, no doubt the city of Chicago has rights by usage over a long period of years." you request that we

"* * * take what legal action is necessary under the statute on prescription, to fix the city of Chicago rights in South Normal avenue, between West 33rd street and West 35th street."

There is nothing in your letter that shows any public use of the east half of South Normal avenue between 34th and 33rd streets. The erection of the fence as shown on the plat is evidence of the intent of the owner to keep his land out of public use.

There are three ways in which to establish public highways: By prescription, by dedication or by condemnation under the power of eminent domain. To establish a public highway by prescription it must be shown that there was adverse, continuous, and uninterrupted travel over such highway by the public for a period of not less than 15 years (Koch v. Mraz, 334 Ill. 67). There is no statute on prescription. A prescription title in a highway is merely the easement or the right that the public acquires in the highway through a continuous use and one adverse to the title holder. The statutes

declare what constitutes public highways. Section 153, chapter 121, Roads and Bridges act, Ill. State Bar Stats. 1935, provides as follows:

"All roads in this State which have been laid out in pursuance to any law of the state, or of the Territory of Illinois, or which have been established by dedication or used by the public as highways for fifteen (15) years, and which have not been vacated in pursuance of law, are hereby declared to be public highways."

If on reinvestigation your department is able to show that the east half of South Normal avenue between the streets in question has been used by the general public free, clear and uninterruptedly with a well defined line of travel continuously for 15 years the city in the exercise of its power has the right to remove the fence and open this portion to the public. If you cannot show the use as above defined and it is important to open South Normal avenue you had better address yourself to the Board of Local Improvements and have them take the necessary steps to condemn the aforesaid thirty-three feet under the provisions of the Local Improvement act.

Opinion No. 7205 of October 22, 1931, to the Commissioner of Public Works is on the same point as the above opinion.

TITLE TO STREET BY DEDICATION OR PRESCRIPTION

(No. 6756—*Commissioner of Public Works—R. N. L.—August 18, 1930—4 pp.*)

The city has no rights for street purposes in property which has not been so dedicated by the owners, unless the city establishes those rights by prescription or long continued use.

Citations:

- Cases: Chicago v. Chicago, Rock Island and Pacific R. R., 152 Ill. 561 (1934).
Manrose v. Parker, 90 Ill. 581 (1878).
Town of Anchor v. Stewart, 270 Ill. 57 (1915).
Tri-City Artificial Ice Co. v. Day, 292 Ill. 545 (1920).

NON-USE OF PROPERTY DEDICATED FOR STREET—BUILDING RENTALS ON LAND TAKEN BY CONDEMNATION

(No. 7934—*City Comptroller—J. J. S.—February 18, 1933—2½ pp.*)

Mere non-use of property held by the city under deeds containing a clause that the property is to revert to former owners in case it is not used for street purposes does not restore the title to the reversionary interests; legislative action by the city abandoning or vacating the same for street purposes would be necessary.

The city has no legal right to retain buildings on land taken for public use, for the purpose of getting a rental return.

CITY'S TITLE BY STREET DEDICATION—ADVERSE POSSESSION OF STREETS BY PRIVATE PERSONS*

(No. 6693—*Commissioner of Public Works—H. D.—June 11, 1930—5 pp.*)

Ownership of a street is in the city when there has been a sufficient acceptance of the offer to dedicate and no revocation or withdrawal of this offer.

The mere holding of a portion of a public street for a long period of time by a private person does not bar the right of the public to regain possession of the full width of the street.

Citations:

Cases: *City of De Kalb v. Lūney*, 193 Ill. 185 (1901).
Village of Lee v. Harris, 206 Ill. 428 (1903-04).

RESERVATION OF RIGHTS IN PRIVATE ALLEY

(No. 8089—*C. N.—June 8, 1933—1½ pp.*)

A declaration of the reservation of property rights in a private alley may be made by "private property" signs conspicuously posted in the alley.

A private way is made public property only when there is an expressed or implied dedication to public use.

FORFEITURE CONDITIONS IN DEDICATION PLAT

(No. 7519—*Superintendent of Maps—C. J. A.—March 28, 1932—2 pp.*)

Where the conditions in a plat of dedication to the city of part of a street might work a forfeiture because they cannot be complied with, they should be submitted to and passed upon by the City Council before the Examiner of Subdivisions undertakes to approve such a clause.

FAILURE OF MORTGAGEES TO SIGN DEDICATION

(No. 6698—*Superintendent of Maps—R. N. L.—June 16, 1930—4½ pp.*)

A dedication of land for alleys is null and void if the mortgagees of the land did not join with the owners of the property in signing the plat of dedication or did not expressly or impliedly acquiesce in the dedication.

To remove this plat from the records of the Recorder's office and

*See also Opinion No. 8413, p. 681, on adverse possession.

the Bureau of Maps and Plats, an ordinance should be passed which rejects this plat of dedication, or the owners of the property should clear the title by judicial proceedings.

Citations:

- Cases: Smith v. Heath, 102 Ill. 130 (1882).
City of Alton v. Fishback, Executor, 181 Ill. 395 (1899).

PLAT OF DEDICATION MAKING CITY LIABLE FOR DAMAGE

(No. 7448—*Superintendent of Maps—C. J. A.—February 13, 1932—4 pp.*)

The Superintendent of Maps may not approve a plat of dedication from the Sanitary District which contains a provision that the city shall assume liability for any damage suit to which the Sanitary District may render itself liable in constructing and maintaining the street dedicated.

The city cannot become a surety for any person or corporation, nor enter into any contract of guaranty or indemnity unless specifically authorized by the legislature to so act.

Citations:

- Ordinances: Code '31: 197, 198.
Cases: Village of Bradley v. New York Central Railroad, 296 Ill. 383 (1921).
State v. Society, 44 N. J. L. 502 (1882).
Other references: Dillon, Mun. Corp. (5th ed.), 814.
44 CJ 75.

**ACCEPTANCE OF STREETS IN DEDICATED SUBDIVISION—
VACATION OF PLAT**

(No. 7580—*Chairman, Committee on Local Industries, Streets, and Alleys—C. J. A.—May 18, 1932—7½ pp.*)

The acceptance of one or more streets in a subdivision dedicated by a valid plat does not amount to an acceptance of all the streets in the subdivision. The statutory right of all the property owners in the subdivision, or some definite part of it, to vacate the plat does not depend on whether the city has or has not accepted the streets or alleys proposed to be vacated.

A plat, or part of a plat, cannot be vacated without the consent of the City Council.

Citations:

- Statutes: Hurd '12, 109: 6, 7.
SH '31, 109: 6.
Cases: Heppes Co. v. Chicago, 260 Ill. 506 (1913).
Chicago Anderson Pressed Brick Co. v. Chicago, 138 Ill. 628 (1891).
Wolpert v. Chicago, 280 Ill. 187 (1918).
Littler v. City of Lincoln, 106 Ill. 353 (1883).

VACATION OF PROPERTY FOR AN ALLEY BY RESUBDIVISION

(No. 6739—*Superintendent of Maps*—R. N. L.—July 30, 1930—5½ pp.)

The vacation of property for an alley by a resubdivision is void where all the owners of property in said plat of resubdivision did not sign and acknowledge the plat of dedication.

Citations:

- Cases: Chicago City Ry. v. Montgomery Ward and Co., 76 Ill. App. 536 (1897-98).
City of Edwardsville v. Barnsback, 66 Ill. App. 381 (1895-96).
Littler v. City of Lincoln, 106 Ill. 353 (1883).
Smith v. Young, 160 Ill. 163 (1896).

ACCEPTANCE OF STREETS ON PLAT—RAILROAD COMPENSA- TION FOR STREET CROSSING

(No. 7825—*Superintendent of Compensation*—C. J. A.—November 30, 1932—7 pp.)

The Kensington and Eastern Railroad is not required to pay compensation for crossing a dedicated alley until the alley has been accepted by the city.

The acceptance of one street on a plat does not necessarily constitute an acceptance of the other streets.

The city is not obligated to accept the streets on a plat at once, but must be allowed a reasonable time, and usually may accept the streets at any time until the offer of dedication is withdrawn.

The mere passage of an ordinance for the opening of a street, not followed up by any court proceedings to carry out the purpose of the ordinance, does not establish a public street nor confer upon the city any title to the property.

If the Kensington and Eastern Railroad Company is properly maintaining a trestle and lighting the subway under it by the provisions of the 1909 ordinance, the company is not liable to pay compensation to the city for that crossing.

Citations:

- Ordinances: Coun. J. (1919-20), p. 987 (Lake front ord., sec. 32).
Id. (1908-09), p. 3636.

- Cases: Chicago v. Drexel, 141 Ill. 89 (1892).
Springs Park District v. Lawrence, 343 Ill. 302 (1931).
Village of Augusta v. Tyner, 197 Ill. 242 (1902).
Hillmer Co. v. Behr, 264 Ill. 563 (1914).
Dewey v. Chicago, 274 Ill. 268 (1916).
Turk v. Chicago, 352 Ill. 171 (1933).

**ACCEPTANCE OF PROPERTY DEDICATION — EFFECT OF
AUTHORIZING RAILROAD IN STREETS***

(No. 6470—*Deputy Superintendent of Streets—R. N. L.—July 16, 1929—7 pp.*)

The ordinance of the Village of Morgan Park (October 13, 1891) giving permission to a railroad company to construct, maintain and operate a railroad along and upon a certain street was a permissive right and the village did not in any way under the ordinance vacate the street or convey any of its rights.

The acceptance on the part of a municipality of an offer to dedicate a street must be by some overt, unequivocal act indicating an intention to appropriate the proposed dedication to the public use.

Citations:

Ordinance: Ordinance of Morgan Park, Oct. 13, 1891.

Statutes: Cal. '27, 109: 9.

Cases: Moore v. Chicago, 261 Ill. 56 (1913-14).

People v. Massillon, 279 Ill. 312 (1917).

**DEDICATION AND VACATION OF STREET ABUTTING CITY
PROPERTY**

(No. 6515—*City Comptroller—P. B. P.—September 26, 1929—7½ pp.*)

The title to the west half of the vacated portion of South Claremont avenue adjoining the city owned property there located is in the city, subject to a right of way for the public. The title of the city to this street is the result of a common law dedication, the acceptance by the city being shown through the erection of street signs, the recognition of the street in official maps, and the cleaning away of snow.

If the street in question is vacated by a city ordinance, the city, as abutting owner, will continue to hold title to the center of it, but without the burden of a right of way for the public.

Citations:

Cases: Prall v. Burckhardt, 299 Ill. 19 (1922).

Hunter v. Middleton, 13 Ill. 50 (1851-52).

Russell v. Lincoln, 200 Ill. 511 (1902-03).

Neale v. Neale, 76 U. S. 1 (1869).

Shields v. Ross, 158 Ill. 314 (1895).

Hull v. Cedar Rapids, 111 Iowa 466 (1900).

Matter of Public Works, 53 Hun. (N. Y.) 556 (1895).

*See also Opinion No. 7108, p. 609.

REMOVAL OF FENCE FROM DEDICATED STREET

(No. 7967—*Commissioner of Public Works—A. F. G.—March 14, 1933—6 pp.*)

Loomis street and Racine avenue are dedicated streets which have never been vacated. The Commissioner of Public Works, therefore, has full authority to order the removal of the fence obstructing access to these streets at 119th and 120th streets.

Citations:

Ordinances: Code '31: 985-987.

Coun. J. (1918-19), p. 514.

Other reference: Op. Corp. Counsel (1911-12), p. 387.

STATUS OF CERTAIN STREET EXTENSIONS

(No. 7122—*Alderman, 48th Ward—C. J. A.—September 14, 1931—4½ pp.*)

Lawrence avenue, Lakeside place, Leland avenue, and Eastwood avenue between Clarendon avenue and the western limits of Lincoln Park as recently extended are lawful streets of the City of Chicago and may be used by the city for all street purposes.

Citations:

Statutes: SH '29, 105: 92, et. seq.

Cases: Miller v. Commissioners of Lincoln Park, 278 Ill. 400 (1917).
Revell v. People, 177 Ill. 468 (1898-99).

CONDITIONAL VACATION OF STREET

(No. 7814—*Commissioner of Public Works—C. J. A.—November 25, 1932—1½ pp.*)

Where the City Council passed an ordinance providing for the conditional vacation of a street and the conditions were never complied with, the street has never been vacated.

The city needs no consent or easement from abutting property owners to lay a water main on a public street.

COMPLIANCE WITH CONDITIONAL VACATION

(No. 7019—*Alderman, 37th Ward—L. H.—July 20, 1931—2 pp.*)

An ordinance for the vacation of an alley conditioned on acceptance of a new dedication and which has not been accepted within the time prescribed therein is of no effect. A new ordinance must be passed to take advantage of its provisions.

QUITCLAIM DEEDS ON PROPERTY VACATED BY CITY

(No. 6569—*City Comptroller—R. N. L.—December 16, 1929—1½ pp.*)

Quitclaim deeds are not issued by the city in cases of vacation, since the ordinance authorizing vacation by law passes title.

RELEASE OF PRINCIPAL ON ALLEY VACATION BOND

(No. 6416—*Commissioner of Compensation—T. W. B.—April 24, 1929—1½ pp.*)

It is contrary to the policy of the city to relieve or exempt the principal of an indemnity bond which has been issued to protect the city against suits for damages that might be started by citizens whose property rights were impaired by an ordinance vacating an alley for a private individual.

Citation:

Ordinance: Coun. J. (1923-24), p. 2039.

*(2) Construction And Maintenance**

BEAUTIFICATION OF STREET PARKWAYS—ROLLER SKATING ON SIDEWALKS

(No. 6635—*Alderman, 40th Ward—C. J. A.—April 10, 1930—4 pp.*)

A property owner may beautify and enclose the parkway of the street in front of his residence, but this must be done with due regard to the safety of the users of the street.

A lot owner will be protected from any liability arising from the beautification of the parkways because of an alleged violation of any city ordinance, if he acts on the advice of the City Forester.

Roller skating on the sidewalks is permitted, if done in a reasonable manner.

Citations:

Ordinances: Code '22: 2709, 2881.

*See Opinion No. 7375, p. 665, on classification of streets for traffic and paving.

PAYMENT OF STREET CLEANING COSTS

(No. 7178—*Mayor—L. H.—October 8, 1931—5 pp.*)

The city cannot defray the expense of cleaning its streets and alleys out of the wheel tax fund as street and alley cleaning is not an "improvement" to which the fund is limited.

Citations:

- Statutes:** Cah. '31, 24: 65 (7, 12, 96).
Id., 95a: 27.
Ordinance: Code '31: 2070.
Cases: City of Waukegan v. DeWolf, 258 Ill. 374 (1913).
Chicago v. Blair, 149 Ill. 310 (1893-94).
Other reference: Op. Corp. Counsel (1923-24), p. 729.
Id. (1924-25), p. 36, 408.
Id. (1925-26), p. 319.
15 Id. 37.
16 Id. 417.

GAS TAX PROCEEDS FOR STREET REPAIR

(No. 7317—*City Council—L. H.—November 24, 1931—2 pp.*)

A gas tax providing that one-third of the amount collected be allotted to the city for street improvement purposes is probably unconstitutional, as the Illinois Constitution does not allow the legislature to impose taxes upon a municipal corporation, or its inhabitants, for corporate purposes.

A bill providing for the distribution of a portion of the proceeds of the gas tax to cities and villages for a limited use in improving and repairing *state* highways or streets connecting with *state* highways, would be valid.

Citations:

- Constitution:** Illinois, art. IX, sec. 10.
Ordinance: Coun. J. (1931-32), p. 590.

PAYMENT OF PUBLIC BENEFIT OBLIGATIONS FOR STREET IMPROVEMENTS FROM SHARE OF MOTOR FUEL TAX

(No. 8410—*Chairman, Committee on Finance—L. H.—May 25, 1934—2½ pp.*)

The city may provide for the payment of due and past due public benefit obligations, resulting from the improvement of state highways and arterial streets under the 1913 ordinance, out of the city's share of the Illinois motor fuel tax.

Citation:

- Statute:** SH '33, 120: 426½.

JURISDICTION OVER RESURFACING OF STREETS

(No. 6752—*President, Board of Local Improvements*—J. L.—August 13, 1930—5 pp.)

The Department of Public Works has a right to issue permits for the resurfacing and repairing of streets and to exercise exclusive control and jurisdiction over those streets only when the resurfacing or repairing amounts to mere repair.

The Board of Local Improvements has exclusive jurisdiction and control of that resurfacing of streets which can be regarded as reconstruction, rebuilding or repaving.

Citations:

- Statute: SH '29, 24: 530(a), 530(b) (Resurfacing of Streets act, secs. 1, 2).
Ordinances: Code '22: 3211-12.
Coun. J. (1926-27), p. 3665.
Cases: Bush v. City of Peoria, 215 Ill. 515 (1905).
Field v. Chicago, 198 Ill. 224 (1902).
Other references: Op. Corp. Counsel (1916-19), p. 120.
American and English Encyclopedia of Law (2nd ed.),
vol. 24, pp. 470-71 and note "repair"; vol. 25, p. 1176,
"local improvement."
4 Words and Phrases (2nd series) 210, "reconstruction."

PRIVATE RESURFACING OF STREETS

(No. 6478—*Commissioner of Public Works*—J. W. B.—July 30, 1929—4 pp.)

The Commissioner of Public Works may issue a permit to a contractor when a group of property owners request that the street or streets upon which their property abuts be repaired by resurfacing at their expense, provided that no proceedings are pending to repair or improve the street by special assessment.

It is the duty of the Commissioner of Public Works to approve or disapprove the specifications offered by a contractor who would resurface a street at the expense of the property owners and to have the work inspected, but no charge can be made to the property owners for the inspection.

REVOCATION OF STREET RESURFACING PERMIT

(No. 8315—*Commissioner of Streets and Electricity*—L. H.—February 21, 1934—2½ pp.)

Where there is unreasonable delay in doing the job, coupled with an expression of an intention to abandon the work, permits for the re-

surfacing of streets by private contract may be revoked by the Commissioner of Streets and Electricity, if he has the concurrence of the Commissioner of Public Works.

Permits for the resurfacing of streets by private contract are revocable for cause.

Citations:

Ordinances: Code '31: 739-741, 761, 762.

NON-COMPLETION OF STREET IMPROVEMENTS—REBATE OF STREET IMPROVEMENT ASSESSMENTS

(No. 8817—Chairman, Committee on Finance—A. A. S.—July 17, 1935—2 pp.)

Where the city has failed to complete the paving of a street because of a question as to its right to a portion of the street claimed by a railroad company, the property owners may bring a suit of mandamus to force the city to complete the street improvement. Holders of vouchers for the work completed are entitled to payment.

If the city obtains other funds to complete the street improvement, the property owners who were assessed are entitled to a proportionate rebate from the special assessment for the portion for which funds are obtained.

Citation:

Case: *Thompson v. City of Highland Park*, 187 Ill. 265 (1900).

DAMAGE TO UNDERGROUND EQUIPMENT BY STREET PAVING

(No. 6477—Commissioner of Public Works—R. N. L.—July 26, 1929—2 pp.)

It is the duty of the Department of Public Works to adjust underground equipment so that it will not be damaged by paving and to furnish a plat to the contracting company showing the location of endangered equipment, or the contractor will not be liable for damages done to said equipment.

STREET OPENINGS FOR UTILITY REPAIR*

(No. 7263—*Commissioner of Public Works—C. J. A.—November 6, 1931—1½ pp.*)

Utility companies should be required to furnish a bond to the city before a permit is issued allowing them to make openings in streets for utility repairs.

Citations:

Ordinances: Peoples Gas Light and Coke Co. charter ordinance of 1858. Code '31: 739-742.

STREET OPENINGS TO LAY UTILITY IMPROVEMENTS

(No. 6445—*Commissioner of Public Works—R. N. L.—June 5, 1929—2 pp.*)

The question of the issuance of a permit for the tearing up of a street to lay utility improvements depends upon the reasonableness of the situation. If conditions warrant added utility equipment, the Commissioner of Public Works should issue a permit to allow the laying of the equipment in the street, provided that the utility company conforms to the ordinances for restoring the street to the same condition as it was before it was torn up.

Citation:

Ordinance: Code '22: 3712.

REVOCATION PERMIT TO LAY PUBLIC UTILITY STRUCTURES IN STREETS

(No. 6692—*Commissioner of Public Works—W. W.—June 11, 1930—5 pp.*)

The Commissioner of Public Works should not revoke a permit given to the Commonwealth Edison Company to lay pipes and conduits in a regularly dedicated street when the permit has been issued in accordance with an ordinance, even though a neighboring property owner complains that his property is being damaged. Under such circumstances neither the commissioner nor the Department of Public Works incurs any personal liability.

The city has the right to use a street for all street purposes, including the right to grant to public utility companies permission to lay pipes and conduits for the purpose of serving the public.

Citations:

Cases: *Sears v. Chicago*, 247 Ill. 204 (1910-11).

Chicago Municipal Gas Light Co. v. Town of Lake, 130 Ill. 43 (1889-90).

*See also Opinion No. 8818, p. 637.

GAS MAINS ON ARTIFICIALLY MADE OR RECLAIMED LAND

(No. 6441—*City Comptroller—R. N. L.—June 1, 1929—2 pp.*)

The city may grant a permit to a utility company to lay a gas main on artificially made, reclaimed or submerged city land, but it cannot grant an easement to the company without legislation by the state.

Citation:

Statute: Ill. Laws (1913), p. 458, sec. 11.

EXTENSION OF STREETS ACROSS RAILROADS

(No. 8204—*Alderman, 10th Ward—J. F. G.—November 6, 1933—1½ pp.*)

It is not proper for the Department of Law to apply to the Illinois Commerce Commission for permission to extend streets across the right of way of railroads until the Board of Local Improvements and the City Council have decided that the extensions of the streets have been determined as public improvements and their character settled by detailed plans.

MAINTENANCE OF PRIVATE ALLEYS

(No. 6952—*Commissioner of Public Works—C. J. A.—June 13, 1931—2½ pp.*)

A private alley is mere private property. The city has no title whatsoever to it and is not obliged to keep it repaired.

Citations:

Cases: Williams v. Chicago, 247 Ill. 240 (1910-11).
Northwest Safe Deposit Co. v. Chicago, 247 Ill. 238 (1910-11).

REIMBURSEMENT FOR SIDEWALK REPAIR

(No. 6906—*Chairman, Committee on Finance—C. J. A.—May 19, 1931—3 pp.*)

The city is not obliged to reimburse a private individual who repairs a sidewalk.

Citations:

Cases: Clarke v. Chicago, 185 Ill. 352 (1900).
Webster v. People, 98 Ill. 343 (1880-81).
Brewster v. City of Peru, 180 Ill. 124 (1899).
Merritt v. City of Kewanee, 173 Ill. 537 (1889).
Village of Lovington v. Gregory, 287 Ill. 169 (1919).
Other reference: 3 Dillon, Mun. Corp., sec. 122.

LIABILITY FOR REPAIRS OF SIDEWALKS AND STREETS CONSTRUCTED BY SPECIAL ASSESSMENT

(No. 8489—*Deputy Commissioner of Streets and Electricity—O. S. F.*
—August 14, 1934—2 pp.)

An abutting owner cannot be made liable for a failure to repair the sidewalks in front of his premises nor can he be compelled to keep the sidewalk free of snow, ice, etc., regardless of whether or not the improvement has been constructed by special assessment.

In the absence of a special agreement with the owner of abutting premises, the city must bear the costs involved in repairing or maintaining the retaining wall which supports the street and vault walls that had been constructed by special assessment.

Citations:

Cases: *Chicago v. Crosby*, 111 Ill. 538 (1884-85).

Gridley v. City of Bloomington, 88 Ill. 554 (1878).

REMOVAL OF SNOW AND ICE FROM SIDEWALKS*

(No. 8594—*C. N.*—December 18, 1934—1 p.)

The city cannot enforce ordinances requiring property owners to keep sidewalks clear of snow and ice, since sidewalks are part of the public highway.

Citations:

Ordinance: Code '31: 882-886.

Cases: *Gridley v. City of Bloomington*, 88 Ill. 557 (1878).

Opinions No. 8682 of February 25, 1935; No. 8649 of January 26, 1935; No. 8590 of December 12, 1934, and No. 8595 of December 19, 1934, all are in accord with the above opinion.

Trees on Street: While shade trees along a street, the fee to which is in the city, belong to the city, an abutting owner has a right of action against a motor coach company for negligently injuring one of them.—*Murtaugh v. Chicago Motor Coach*, 269 Ill. App. 290 (1933).

CONSTRUCTION OF CROSSING AT MICHIGAN AND ROOSEVELT

(No. 7923—*Commissioner of Public Works—A. F. G.*—February 2, 1933—8½ pp.)

The city's control over Michigan avenue is limited to the rights specifically received in the ordinance of June 23, 1878 except at its intersection with streets.

The city has the power to construct an overhead or underground street crossing at the intersection of Roosevelt road and Michigan

*See also Opinion No. 8609, p. 685.

avenue, subject only to such reasonable restrictions as the park commissioners may impose to prevent interference with the use of the intersection for boulevard or driveway purposes.

Since the South Park Commission may reasonably restrict the proposed viaduct at Roosevelt road and Michigan avenue, the city should apply for a permit or submit its plans to the Commission for approval.

Citations:

- Statutes:** Ill. Private Laws (1869) vol. 1, p. 358 (Board of South Park Commissioners act, secs. 2, 4, 13).
Ill. Laws (1879), p. 216 (act concerning Michigan Blvd.).
Ordinance: Coun. J. (1879-80), p. 54.
Cases: McCormack v. South Park Commissioners, 150 Ill. 516, 523 (1894).
People v. Chicago Motor Bus Co., 295 Ill. 486 (1920).
West Chicago Park Commissioners v. Chicago, 170 Ill. 618 (1897-98).
Chicago City Railway v. South Park Commissioners, 257 Ill. 602 (1912-13).
South Park Commissioners v. Chicago City Railway, 286 Ill. 504 (1919).

(3) *State Jurisdiction*

DEDICATION OF STREET IMPROVEMENT TO STATE—COMPENSATION FOR TUNNEL UNDER STATE HIGHWAY

(No. 8939—Alderman, Sixth Ward—B. H.—November 21, 1935—3 pp.)

No dedication to the state of a street improvement on a state-aid road is necessary, as the city's right is derived from the state, and the state may at any time, resume control of the street without the sanction or authority of the city officials.

The city may charge as compensation only for that portion of the underground tunnels, in connection with South Chicago avenue, that extends from the building line to the curb on both sides of the avenue. However, the balance of the street, used primarily as a thoroughfare for vehicular traffic, is exclusively under the jurisdiction of the State Department of Public Works and Buildings.

Citation:

Statute: SH '35, 121: 297.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter making inquiry as to the city's right in connection with street improvements on South Chicago avenue. I shall endeavor to reply to your inquiries in the order in which they were submitted.

You first inquire whether the improvement is an arterial or a state-aid road. The street improvement on South Chicago avenue in the vicinity of

number 7240 and 7247 is a "state-aid road" and not an arterial highway. No dedication to the state is necessary on projects of this character, the legal theory being that inasmuch as the city's right is derived from the state and is subservient to its demand, the state may at any time resume control of the same without the sanction or authority of the city officials. While it has been the custom to secure a permit from the City Council in matters of this kind, such procedure is legally unnecessary and might be properly dispensed with by the state.

You next inquire as to whether or not the city has retained control of South Chicago avenue so as to authorize it to make a charge in the nature of compensation for "underground tunnels, etc." Section 7 of the Roads and Bridges act provides as follows:

"The highways designated in this act as State highways shall be taken over from the several towns and road districts and from the several cities, villages and incorporated towns by the Department of Public Works and Buildings. * * *"

"Whenever any part or portion of any highway which is a part of the State highway system lies and is situated within the limits of any city, village or incorporated town, is taken over, the Department of Public Works and Buildings shall have *exclusive jurisdiction* and control over only that part of such highway which the State has constructed or which the local authority has constructed and which has been taken over by the State and for the maintenance of which the State is responsible."

In view of the foregoing quoted section of the statute and the generally recognized legal status of the city in matters of this kind, I am of the opinion that the city could charge compensation only for that portion of the property that extends from building line to the curb on both sides of South Chicago avenue; the balance of the street occupied primarily as a thoroughfare for vehicular traffic is exclusively under the jurisdiction of the Department of Public Works and Buildings of the state.

For your further information, the District Engineer, Division of Highways of the Department of Public Works and Buildings of the State of Illinois writes us that it is customary for the state to issue a permit for tunnels of the character referred to in your letter and that he could see no reason why a permit should not be issued upon application to his department subject, however, to proper authority being obtained from the city to cover any interest it may have in the property involved. I attach a copy of the form to be used in making application for such a permit from the State Highway Department.

CREATION OF STATE SUPER-HIGHWAY AUTHORITY

(No. 7768—Chairman, Committee on Traffic and Public Safety—
W. L. S.—October 11, 1932—5½ pp.)

The state legislature may create an agency empowered to plan, designate, locate, construct, maintain, operate and supervise special types of traffic facilities, such as super-highways, in portions of the state which include two or more counties, may allocate to it the powers of highway construction possessed by the State Highway Department, counties, cities and villages, and may provide for the appointment of persons to constitute the executive authority of such an agency. It is extremely doubtful if such a municipal corporation

could be created by special act; a general law would probably be necessary.

Such an agency could collect general taxes, could levy a vehicle tax only if other political subdivisions within its jurisdiction do not, and could levy a motor fuel tax if the state does not.

STATE'S POWER TO TAKE OVER CITY STREET

(No. 8711—Chairman, Subcommittee on Local Industries, Streets and Alleys—J. J. S.—March 14, 1935—1½ pp.)

The State Department of Public Works and Buildings may take over city streets as extensions of bond-issue roads or federal-aid roads without legislative action on the part of the City Council.

The state's jurisdiction is limited to that part of the street that it constructs or maintains, and the city has full jurisdiction over the policing of the street and the issuing of permits for driveways or for signs or canopies to be erected over the sidewalk space.

Citations:

Statute: SH '33, 121: 300a.

Other reference: Opinion No. 8454 (this volume, p. 660).

STREET IMPROVEMENTS BY STATE-AID FUNDS

(No. 7394—Alderman, 7th Ward—F. J. V.—December 19, 1931—3½ pp.)

The acceptance by the city of state aid from the gas tax fund or otherwise would give the state control over that portion of the street improved and maintained by state funds.

Citations:

Statutes: SH '29, 121: 297, 300a, 301.

Case: Village of Glencoe v. Hurford, 317 Ill. 203 (1925).

RIGHTS OF STATE AND CITY IN STATE-AID ROAD

(No. 7690—Alderman, 10th Ward—C. J. A.—August 3, 1932—5 pp.)

Where any streets in the City of Chicago have been paved by state funds, the state, unless it enters into a contract with the city, under the act of 1931, providing that the city shall assume the maintenance of the same, acquires jurisdiction only over that portion of the street which the state has improved, while the rest of the street remains

under the jurisdiction of the city as before, subject, however, to the right of the state to erect and maintain any necessary guide signs.

Citations:

Statutes: SH '31, 121: 296b, 297 (State Highways act, secs. 6a, 6c, 7, 10 $\frac{1}{4}$, 10 $\frac{1}{2}$, 16).

Case: Village of Glencoe v. Hurford, 317 Ill. 203, 212 (1925).

COST OF LIGHTING STATE-AID ROADS

(No. 8031—*Chairman, Committee on Finance—Jud. G.—April 26, 1933*
—4 $\frac{1}{2}$ pp.)

The State Department of Public Works and Buildings can use its share of the motor fuel tax to light state roads located within the limits of the city.

Where it is necessary to light a city street which is a state-aid road, the cost of that lighting should be shared with the city by the State Department of Public Works and Buildings from its share of the motor fuel tax.

Citations:

Statutes: SH '29, 120: 424.
Id. 121:9.

CITY'S PAVING STATE HIGHWAYS

(No. 6788—*President, Board of Local Improvement—R. N. L., and J. L.—October 16, 1930—5 pp.*)

The state has the right to designate any street within the city as a state highway and to pave the street, but this right does not prevent the city from proceeding by special assessment to pave streets over which a state highway passes, nor need the city secure the permission of the state in order to pave those streets.

The permission of the state must first be secured before the city can disturb a state highway by the installation of utilities or improvements.

Citations:

Statutes: SH '29, 121: 288a, 300c.

Case: City of Geneseo v. Shearer, 326 Ill. 82 (1928).

REMOVAL OF CITY SIGNS FROM STATE HIGHWAYS—TYPES AND WEIGHTS OF MOTOR VEHICLES

(No. 8409—*Acting Commissioner of Streets and Electricity—M. H. F.—May 25, 1934—6 $\frac{1}{2}$ pp.*)

The city must remove its "Stop-Thru-Street" signs from those city streets which are also parts of the state highway system when so re-

quested by state highway authorities, since the city's power in this regard has been repealed by state statute and vested in the state highway department.

The city's jurisdiction as to the types and weights of vehicles* that may travel on its streets and as to the designation of one-way streets remains unimpaired.†

Citations:

- Statutes:** SH '33, 24: 7-11, 14, 17, 20.
Id., 121: 6a, 6b, 7, 10¼, 16 (Roads and Bridges).
Ordinance: Uniform Traffic Code, art. VI, sec. 35.
Cases: Ferguson Coal Co. v. Thompson, 345 Ill. 20, 28 (1932).
Malleable Iron Co. v. Park Commissioners, 263 Ill. 446 (1914).
People v. Chicago and Eastern Illinois Ry., 306 Ill. 402 (1923).
MacGregor v. Miller, 324 Ill. 113 (1927).

USE OF FUEL TAX FUNDS FOR GRADE SEPARATIONS

(No. 6941—Chairman, Subcommittee of Committee on Track Elevation—L. H.—June 11, 1931—3 pp.)

The so-called Hunter bill (House Bill 269), an amendment to the Fuel Tax law, specifically authorizes grade separations on state highways in cities, towns and villages, whereas there might have been some doubt prior thereto as to whether money derived from the fuel tax could be so used.

Citation:

- Statute:** Motor Fuel Tax act, sec. 11 as amended.

JURISDICTION OF STATE PUBLIC WORKS DEPARTMENT—ONE WAY TRAFFIC—COUNTY ROAD CONSTRUCTION

(No. 8454—Chairman, Committee on Local Industries, Streets and Alleys—J. J. S.—July 6, 1934—8½ pp.)

The jurisdiction of the State Department of Public Works and Buildings extends to all state bond-issue roads, state-aid roads and federal-aid roads within the city and to all city streets taken over and maintained or constructed by the department to facilitate traffic from bond-issue or federal-aid roads.

The State Department of Public Works and Buildings has exclusive jurisdiction and control over those highways that the state has constructed or which the local authority has constructed and the state has taken over and maintains; as to other streets or portions thereof,

*See Opinion No. 7709, p. 662.

†A new state Uniform Traffic Code was enacted in 1935 subsequent to the writing of this opinion.

its power is limited to determining the types and kinds of traffic signals to be used.

The Illinois Department of Public Works and Buildings can take over city streets as extensions of bond-issue or federal-aid roads.

With respect to state highways within the city, the city retains power to designate streets for one-way traffic and to erect and maintain appropriate signs respecting such use.

When the county constructs a road within the city, it acts as an agency of the state and retains no control over the road; the control goes to the state if the road so constructed becomes a part of the state highway system.

Citations:

Statutes: SH '33, 121: 292, 296, 296a-296f, 297, 300a, 300b.

CONSTRUCTION, MAINTENANCE, AND IMPROVEMENT OF STREETS BY STATE OR COUNTY

(No. 6889—*Commissioner of Public Works—L. H.—May 4, 1931—4½ pp.*)

State-aid or county roads may be constructed in municipalities by an agreement between the Illinois Department of Public Works and Buildings and the City Council, through an ordinance passed by the Council and accepted or otherwise approved by the state department; this ordinance should provide for the material, method of construction and the division of the expense.

Where the county or state authorities undertake to improve a street which the City Council desires to improve by special assessment under the Local Improvement act, the ordinance providing for a special assessment should be so drafted that provision is made for the construction of a part of the improvement by the state or by the county.

Where the state or county pays for a part of a highway, it is responsible for the maintenance of that part, and the city is responsible for the maintenance of the portion for which it has paid.

Citation:

Statute: SH '29, 121: 9.

APPLICABILITY OF STATE LAWS TO CITY STREETS

(No. 7714—*Commissioner of Police—C. J. A.—August 12, 1932—3 pp.*)

The city streets, although placed under the jurisdiction of the city for certain purposes, are, in a general sense, state highways as much

as highways outside the city, and state laws relating to "improved public highways" apply equally to city streets unless they are expressly excluded from the operation of the law.

The provisions of the Motor Vehicle act relating to speed and pneumatic tires on motor vehicles apply to city streets as well as highways outside the city.

Citations:

Statutes: SH '31, 121: 201, 205 (Motor Vehicle act, secs. 1, 5).

MOTOR VEHICLE REGULATIONS CONTRARY TO STATE LAW

(No. 8239—*Chairman, Committee on Traffic and Public Safety—M. H. F.—December 13, 1933—2½ pp.*)

The city may not authorize vehicles equipped with hard tires to operate on its streets at speeds greater than the maximum fixed by the State Motor Vehicle act.

The streets of the city are highways of the state and the city may not adopt regulations concerning motor vehicles which contravene the State Motor Vehicle act.

Citations:

Statutes: SH '33, 121: 205, 223, 224, 225, 225a, 227.

REGULATION OF WEIGHT AND DIMENSION LIMITS OF MOTOR VEHICLES

(No. 7709—*F. J. B.—August 10, 1932—3 pp.*)

The maximum gross weight, length and width of motor vehicles as prescribed by state law applies to public highways within as well as without the city and a person operating a vehicle of a weight or dimension in excess of these limits is subject to prosecution under the state law.

A city ordinance prescribing weights or dimensions for motor vehicles higher than the maximum limits provided by statute would be void.

Citations:

Statute: Ill. Laws (1931), p. 793-800.

Ordinance: Coun. J. (1931-32), p. 937 (Uniform traffic code).

Cases: Chicago v. Foley, 335 Ill. 584 (1929).

Ferguson Coal Co. v. Thompson, 343 Ill. 20 (1931).

Other reference: Opinion No. 7690 (this volume, p. 658).

REGULATION OF LOADS AND LENGTHS OF MOTOR VEHICLES*

(No. 7772—*Commissioner of Public Works—C. J. A.—October 11, 1932—4½ pp.*)

The state law does not permit cities having a population of more than 20,000 to increase the 40,000 pound gross load limit on six wheel vehicles fifty per cent.

The ordinance of the city which prohibits the operation of four-wheel trucks having a greater gross than 36,000 pounds prevails on the streets in the city designated as state highways over which the Illinois Highway Department has considerable supervision.

The state law does not permit any city to change the overall length of one vehicle beyond 35 feet or a combination of vehicles beyond 40 feet.

The state laws supersede city ordinances on the same subject.

Citations:

Statute: SH '31, 121: 203.

Ordinances: Code '31: 2054, 2058.

(4) Traffic and Parking†**RESPONSIBILITY FOR TRAFFIC REGULATION**

(No. 7565—*City Council—C. J. A.—May 4, 1932—4 pp.*)

The city is responsible for enforcing the laws, ordinances and regulations pertaining to highway and street traffic only within the city limits, and it is restricted solely by certain reservations which the state has made, regarding the general maintenance and control by the state of traffic upon such streets or portions of streets as it has constructed or taken over.

Citations:

Statutes: SH '31, 24: 421, 422.

Id. 12: 311.

Id. 21: 300b.

Id. 121: 297.

STATE MOTOR VEHICLE ACT—WEIGHTS AND LOADS

(No. 6540—*Inspector of Weights and Measures—M. H. F.—November 12, 1929—5½ pp.*)

The power of the city to regulate the use of its streets by the

*This opinion was written prior to the enactment in 1935 of a new state Uniform Traffic Code.

†See Opinion No. 7714, p. 661, and Opinion No. 8239, p. 662, on the enforcement of state traffic laws on city streets.

passage of an ordinance is only limited by the Illinois Motor Vehicle act, which, among other things, fixes the maximum weight for four or six-wheeled vehicles and their loads, and beyond which limit the city cannot permit any use.

Citations:

Statute: SH '27, 121: 203.

Case: Chicago v. Foley, 335 Ill. 584 (1929).

USE OF STREETS BY HEAVY TRUCK

(No. 7906—C. N.—January 18, 1933—3½ pp.)

A truck may enter a street wherein heavy traffic is prohibited for the purpose of delivering or picking up merchandise where no other ingress or egress is available.

Citations:

Ordinances: Code '31: 2058.

Uniform traffic code, sec. 38(b).

REFLECTOR IN LIEU OF RED LIGHT ON VEHICLE

(No. 6454—Chairman, Committee on Judiciary and Special Assessments—M. H. F.—June 19, 1929—3 pp.)

A proposed ordinance permitting the use of reflectors on the rear of motor trucks or animal drawn vehicles instead of red lights would be invalid as it contravenes a state statute.

Citations:

Ordinances: Code '22: 4016.

Statutes: Illinois Motor Vehicle act (1927), sec. 16.

SH '27, 121: 306a.

INTERPRETATION OF "IMPROVED PUBLIC HIGHWAYS"— PNEUMATIC TIRES*

(No. 7555—L. H.—April 23, 1932—2 pp.)

The phrase "improved public highways" in section 9 of the Motor Vehicle act, as amended in 1931, which deals with pneumatic tire requirements, includes improved city streets as well as state-controlled highways within the city.

Citations:

Statutes: Ill. Laws (1931), p. 807.

Id., p. 795 (Motor Vehicle act, sec. 9).

*See also Opinion No. 7714, p. 661, and Opinion No. 8239, p. 662.

ARREST TICKETS ON AUTOS

(No. 7403—*Chief Justice, Municipal Court of Chicago—Jud. G.—December 31, 1931—5½ pp.*)

An "arrest ticket", attached to an automobile to notify the driver of a traffic violation by him, is constitutional so long as the ticket is not used in place of a court summons.

Citations:

Statute: Municipal Court act, secs. 477, 487.

Ordinances: Code '31: 2029-30.

CLASSIFICATION OF STREETS FOR TRAFFIC AND PAVING

(No. 7375—*Alderman, 10th Ward—C. J. A.—December 14, 1931—4½ pp.*)

The City Council has the authority to make any reasonable classification of streets it deems proper and designate certain streets for heavy traffic and others for light traffic and to adopt plans of paving in accordance with these designations.

Citations:

Statute: Cities and Villages act, secs. 7, 9.

Cases: Cicero Lumber Co. v. Town of Cicero, 176 Ill. 9 (1898).

People v. Walsh, 96 Ill. 232 (1880).

Chicago v. Union Building Association, 102 Ill. 379 (1882).

City of Lincoln v. Gerard, 329 Ill. 501 (1928).

McCray v. Chicago, 292 Ill. 60 (1920).

Melton v. City of Paris, 333 Ill. 190 (1929).

Ferguson Coal Co. v. Thompson, 343 Ill. 20 (1931).

PROGRESSIVE TRAFFIC SIGNALS

(No. 7386—*Commissioner of Public Works—C. J. A.—December 16, 1931—4 pp.*)

The establishment of progressive traffic signals for speeds in excess of twenty-five miles an hour would not be unlawful or contrary to the statute.

Citations:

Statute: Motor Vehicle act, secs. 22, 26.

Cases: Stanfield v. Wood, 231 Ill. App. 586 (1924).

Morrison v. Flowers, 308 Ill. 189, 195 (1928).

Hoigard v. Yellow Cab Co., 320 Ill. 317 (1926).

Ferry v. National Motor Underwriters, 244 Ill. App. 241 (1927).

COST OF TRAFFIC EQUIPMENT INSTALLATION ON STATE HIGHWAY

(No. 8056—*Commissioner of Department of Gas and Electricity—Jud. G.—May 15, 1933—2½ pp.*)

The state highway department should contribute its share to meet the expenses of installing street lights and traffic control equipment in conjunction with the improvement of state highways within the city limits.

Citation:

Statute: SH '29, 121: 9.

REMOVING PRIVATE LAMP POST TO ERECT TRAFFIC SIGNAL

(No. 7842—*Chairman, Finance Committee—C. N.—December 16, 1932—3 pp.*)

The city is not liable to the original erector for the removal of a lamp post necessitated by the installation of "stop and go" lights, since such lights are traffic controls and installed by virtue of the city's police power and not under its eminent domain power.

Lamp posts installed under a permit of the city becomes quasi-public property, subject to legislative control.

Citations:

- Cases:** Canfield v. United States, 167 U. S. 518 (1897).
Clinard v. Winston-Salem, 178 N. C. 365 (1917).
Cincinnati, Indianapolis and Western Railway v. Connersville, 170 Ind. 316 (1908).
Howell v. City of Buffalo, 37 N. Y. 267 (1867).
Chicago, Burlington and Quincy Railway v. People, 200 U. S. 561, 592 (1906).
Morris v. Esoner, 96 N. J. Eq. 538 (1924).
Smith v. Central Power Co., 103 Ohio 681 (1921).
Chicago v. O'Connell, 278 Ill. 604 (1917).

CROSSING DOUBLE LANE STREET

(No. 8360—*Post Office Inspectors—M. H. F.—April 9, 1934—3 pp.*)

Where the center parkway of an avenue is not wide enough to cause the two lanes to be treated as two separate streets and where one set of traffic lights directs the entire traffic at an intersection of this avenue, a motorist who has proceeded to cross said avenue on a green light is entitled to go through the entire intersection and clear both lanes before other traffic proceeding from the cross direction has the right of way.

Citations:

Ordinance: Coun. J. (1931-32), p. 937 (Uniform traffic ord., secs. 1, 7, 8, 16).

RIGHT OF WAY FOR PHYSICIAN'S AUTOMOBILE

(No. 6720—*Acting Commissioner of Police—C. J. A.—July 16, 1930—4 pp.*)

Physicians who have obtained physicians' permits and insignia on motor cars are entitled to all reasonable courtesy by the police in preventing traffic delays when they are answering calls for professional services.

Citations:

Ordinances: Code '11: 2874.
Code '22: 3860-61.

REMOVAL OF STALLED CAR

(No. 8608—*C. N.—December 31, 1934—1½ pp.*)

The city is not liable for the cost of removing snow around a car which had been moved by the city as interfering with traffic after the owner failed to comply with an order to move it.

A mechanical defect does not relieve the owner of a stalled car of the responsibility of removing such auto when it interferes with traffic.

REMOVAL OF UNLAWFULLY PARKED VEHICLES

(No. 7325—*Commissioner of Public Works—L. H.—November 28, 1931—2 pp.*)

The city has no authority under which it can establish a pound for unlawfully parked vehicles.

An ordinance authorizing the Commissioner of Public Works to remove unlawfully parked vehicles and to charge the expense to the owner would probably be valid.

The city can authorize a quick removal of automobiles that encumber the streets contrary to the parking ordinance, by an additional ordinance.

Citation:

Ordinance: Uniform traffic ord., art. V, sec. 23 (All-night parking).

FOUND FOR UNLAWFULLY PARKED AUTOMOBILES

(No. 7244—L. H.—November 2, 1931—3 pp.)

An ordinance authorizing the Commissioner of Public Works to remove automobiles that encumber the streets contrary to the parking ordinances and to charge the expense of such removal to the owners of the automobiles would probably be valid, but the city has no power to impound autos parked contrary to ordinance requirements and to charge a fee for the recovery of such impounded cars.

Citations:

Statute: SH '31, 24: 65.79.

Ordinances: Code '31: 159, 975, 976.

Other reference: Dillon, Mun. Corp. (5th ed.), sec. 310.

**REGULATION OF PARKING BY PUBLIC PASSENGER
VEHICLES**

(No. 7480—Committee on Local Transportation—B. J. K.—March 7, 1932—3 pp.)

The City Council has power to pass and enforce an ordinance which prohibits public passenger vehicles from parking at locations where other automobiles may stand, but this ordinance must be reasonable and adapted to the promotion of the public welfare.

The reasonableness of this type of ordinance does not depend on what is best, but merely on whether the ordinance is fairly appropriate under all the circumstances.

Citations:

Statute: SH '31, 24: 65.41.

Ordinance: Code '31: 2097.

Cases: People v. Thompson, 341 Ill. 169 (1931).

Haggenjos v. Chicago, 336 Ill. 576 (1930).

Parking to Unload: An ordinance of the city prohibiting the stopping of vehicles on business days in the loop district of the city for more than three minutes for loading or unloading as to passenger cars and thirty minutes as to commercial vehicles is valid.—Chicago v. McKinley, 344 Ill. 299 (1931).

Angle Parking: On streets forming a part of the state highway system, angle parking may be permitted by local ordinance on that portion of the street not under the jurisdiction and control of the state.—Ill. Laws (1st sp. sess., 1935), p. 21.

PARKING AND DRIVING OF AUTOMOBILES WITHOUT LIGHTS

(No. 6754—C. J. A.—August 14, 1930—2½ pp.)

The licensing and regulation of public garages is to protect the public, whereas the regulation of automobile parking is to promote

the safety of the public and neither matter is dependent upon the other.

The ordinance which forbids the parking or driving of automobiles at night without lights has a proper bearing on the regulation of traffic and it is not unreasonable.

Citations:

Ordinance: Code '22: 4016.

Case: Haggenjos v. Chicago, 236 Ill. 573 (1908).

ENFORCEMENT OF ALL-NIGHT PARKING REGULATIONS

(No. 6736—*Acting Commissioner of Police—C. J. A.—July 29, 1930—5 pp.*)

The police department may proceed against motor vehicle owners who park their cars all night on streets without lights under the pertinent provisions of either the Motor Vehicle act or the City Code. Since the fines are collected by the city, it is recommended that the police department proceed under the code.

Citations:

Statute: Motor Vehicle act, secs. 16, 43.

Ordinance: Code '22: 4016, as amended Jan. 2, 1925.

Opinion No. 7594 of June 3, 1932, to the Commissioner of Police is in accord with the above opinion.

Ordinance and Act on Same Point: Where a municipality finds a person guilty of driving a vehicle while intoxicated in violation of its ordinance and imposes a penalty, the conviction is valid under the ordinance, even though the Motor Vehicle law forbids the same act and carries a greater penalty therefor than does the ordinance.—*Village of Winnetka v. Sinnott*, 272 Ill. App. 143 (1933).

DOUBLE PARKING ON STREETS

(No. 8933—*F. V. M.—November 19, 1935—1½ pp.*)

No concession can be granted to a company, to allow it to park double for a few minutes in order to make deliveries.

The uniform traffic code provides that vehicles must park parallel to and within six inches of the edge of the roadway, but excepts vehicles that are used for the transportation of merchandise or materials, permitting them to back into the curb if the owner of the vehicle has been issued the necessary permit by the Commissioner of Public Works.

Citation:

Ordinance: Uniform traffic code, art. V, secs. 19, 24.

LOCKING AUTO DOORS AND IGNITION

(No. 7822—Mayor—Jud. G.—November 28, 1932—1 p.)

The City Council has the power to require that the doors and ignition of parked automobiles be locked.

ENFORCEMENT OF PARKING REGULATIONS IN MARKETS

(No. 6417—Superintendent of Maxwell Street Market—J. W. B.—April 25, 1929—4 pp.)

The police department has no right to enforce general parking regulations within the boundaries of any public street that the City Council has established as a public market place, since the market ordinance which designates how wagons and stands are to be located in a public market supersedes the general ordinance relative to the parking of vehicles on public highways of the city.

Citations:

Ordinances: Code '22: 2505-07, 2510, 2513, 2514, 3858.

Statute: SH '27, 24: 65.48.

EFFECT OF AMENDMENTS TO REPEALED PARKING ORDINANCE

(No. 7537—Mayor—L. H.—April 11, 1932—1½ pp.)

The proposed ordinances for parking restrictions presented in the form of an amendment to section one of the traffic ordinance that was passed July 2, 1923, are void and ineffective, as this ordinance has been repealed.

Citations:

Ordinances: Coun. J. (1923-24), p. 704 (Parking ord.).

Id. (1931-32), p. 937 (Uniform traffic code).

NEW CITY POWERS

Auto Inspection: Any city having a population exceeding 40,000 may by ordinance require the resident owner of a motor vehicle to submit, not more often than semi-annually, to a compulsory inspection of the mechanics and equipment of the motor vehicle.—Ill. Laws (1935), p. 1228.

All motor vehicles for the transportation of persons or property owned and operated by residents of the city on city streets must be inspected at one of the municipal testing stations established throughout the city. Such inspection shall be to test whether the motor vehicle conforms with the standard for safe operation required by law.—Coun. J. (1935-36), p. 824.

Any city over 40,000 population may appropriate monies annually from vehicle license revenues for the construction and operation of testing stations for the inspection of motor vehicles.—Ill. Laws (1st sp. sess., 1935), p. 63.

Auto Accident Reports: Any city may by ordinance require that the driver of a vehicle involved in an accident shall file with a designated department a report of such accident for the confidential use of the city department.—Ill. Laws (1935), p. 1257.

B. SPECIAL USE OF STREETS

USE OF STREETS FOR PARADES

(No. 8855—Commissioner of Police—Q. O'B.—August 21, 1935—4 pp.)

The Commissioner of Police may refuse a permit to use streets for a parade, if the parade is for an unlawful purpose, or may cause a breach of the peace, or may unduly interfere with the normal use and traffic of streets.

A parade with the avowed purpose of protest and organized propaganda might easily result in a breach of the peace.

The Civil Rights act would be violated if the Commissioner of Police refused to grant a permit for a parade because the participants were colored.

Citations:

Statute: USCA, Title 8, sec. 41 (Civil Rights act).

Ordinance: Code '31: 979.

OPINION OF FOREGOING SYNOPSIS

Answering your request for advice as to your powers and duties relative to the application of the joint conference for the defense of Ethiopia and the Chicago Civil Liberties Committee, through their respective secretaries for a permit to parade on various streets of Chicago on the afternoon of August 31, 1935, as a protest against Italy's threat of war against Ethiopia, please be advised that the Revised Chicago Code of 1931 vests in the Commissioner of Police the powers to grant or refuse permits for processions or parades and open-air meetings.

Section 979 of said Code is as follows:

"979. Processions and open-air meetings—application for permit.) No parade or procession shall be allowed upon any street or public way in the city, nor shall any open-air public meeting be held in or upon any ground abutting any street or public way in the city, until a permit in writing therefor shall first be obtained from the police department. Application to conduct such parade or procession or open-air meeting shall be made in writing to the commissioner of police by the person or persons in charge or control thereof, or responsible therefor, and such application shall set forth the route along which such parade or procession is to proceed, the time of starting, and the name or names of the person or corporation or society in control thereof or responsible therefor and the purpose of such parade and procession; and, in case of an open-air meeting, such application shall specify the place at which it is desired to hold such meeting, the purpose thereof, and the name of the person, corporation or society in control thereof or responsible therefor, the time at which such public meeting is to be held, and the probable duration thereof. Upon such application being made, the commissioner of police shall investigate or cause to be investigated the person, corporation or society making such application and the truth of the statements made in such application regarding the purpose or object of such parade, procession or open-air meeting, and if he shall find that such parade, procession or open-air meeting is

not to be held for any unlawful purpose and will not in any manner tend to a breach of the peace, or unnecessarily interfere with the public use of the streets and ways of the city or the peace and quiet of the inhabitants thereof, he shall issue such permit to the person, corporation or society making application therefor, without fee or charge."

Under the provisions of this section of the Code you have the power in your wisdom and discretion after investigating the application for a permit, to grant or refuse said permit, and if you are of the opinion that the said parade or procession is to be held for an unlawful purpose or that it would in any manner tend to create a breach of the peace, or the peace and quiet of the inhabitants of this city, or unduly interfere with the normal use and traffic of the public streets of the city, it would be not only your right but duty to refuse the permit. In passing on this problem you have a right to keep in mind that there is an international question involved in which there are strong racial and factional feelings already aroused, that the application frankly states that the proposed parade is a protest and organized propaganda to induce our government through its Congress to take action in reference to said international imbroglio with a view of placing an embargo on the exportation of munitions to be used by Italy and on loans of money which Italy may seek in this country and to deport "Mussolini's propaganda agents from the United States."

If the City of Chicago should grant a permit to use our streets for these avowed purposes, probably emphasized and aggravated by slogans on banners and placards, it might be deemed by Italy, with whom our nation is at peace, and our Italian citizens, as a hostile or unfriendly act and unjustifiable interference in or criticism of their affairs and there is a danger that such a parade might precipitate a breach of the peace through racial feeling. No doubt it was for these reasons that the Chicago Park District has refused to grant a permit to these people for a parade and open-air meeting in Washington Park.

The letter from the executive secretary of Chicago Civil Liberties Committee, to you intimates that a refusal of the permit or the interference with this parade might be a violation of the rights of the colored people under the Federal Civil Rights act.

We have examined this act in the Federal Code and the leading decisions of the Supreme Court of the United States and in interpreting it find that there is nothing to this point. The Civil Rights act (Section 41, Title 8, United States Code Annotated) is a federal statute guaranteeing to the colored race rights given them by the 13th and 14th amendments to the Constitution of the United States and provides that all persons within the jurisdiction of the United States shall have the same rights and privileges and shall be entitled to the same and equal benefits of all laws and proceedings for the security of persons and property as are enjoyed by white citizens. In other words, there shall be no discrimination against anyone because of race or color. If it could be reasonably conceived that you would refuse to grant this permit because you thought that paraders would be largely or wholly of the colored race and that this consideration motivated your decision without there being other reasons for its refusal, then the Civil Rights act would be applicable, otherwise not.

Therefore under the provisions of Section 979 of the Chicago Code above quoted, after an investigation of all the facts and circumstances and especially those appearing in the application and written correspondence, the granting or refusing of this permit is a matter which lies in your discretion.

* * * * *

USE OF STREETS FOR CARNIVALS

(No. 7038—Mayor—L. H.—July 30, 1931—1 p.)

To permit the use of specified streets for carnival purposes, such authorization must be by ordinance in order to override the code provision prohibiting the use of streets for purposes of trade and obstructions on streets.

Opinion No. 7058 of August 5, 1931, to the Mayor is in accord with the above opinion.

USE OF STREET FOR "BABY PARK"

(No. 6712—Alderman, 49th Ward—C. J. A.—July 9, 1930—3 pp.)

A portion of a street not needed for public travel may be temporarily used for any other public purpose such as a "baby park."

Citations:

Cases: Martens v. Public Service Co. of Northern Illinois, 219 Ill. 160 (1905-06).

City of Fairbury v. Barnes, 228 Ill. App. 389 (1923).

Sears v. Chicago, 247 Ill. 204 (1910-11).

CITY'S CONTROL OVER STREETS

(No. 8972—Alderman, 10th Ward—J. J. S.—December 18, 1935—1½ pp.)

No citizen has a right to make an opening in or put an obstruction on a city street without a permit from the city as the city has full control of the streets from lot line to lot line except on state-aid roads.

Vending Machine on Streets: A permit is required for all automatic vending machines installed on any public sidewalk, or attached to any building so as to project over any public sidewalk.—Coun. J. (1931-32), p. 1025.

PRIVATE CONNECTION WITH CITY PROPERTY—REPAIR OF DOCK ABUTTING CITY PROPERTY

(No. 6451—Commissioner of Public Works—R. N. L.—June 17, 1929—2½ pp.)

Where a company desires to use city property as a means of access to a public thoroughfare, the city's consent should be obtained in the form of an agreement, thus forestalling any future claim that this means of access has become a public street.

The city should repair the dock on which its property abuts, if such repair is necessary.

Driveway Permits: Section 856 of the City Code, dealing with driveway permits, is held to be unconstitutional as vesting in an administrative officer unlimited and unguided discretion.—Lydy v. Chicago, 356 Ill. 230 (1934).

SELLING ON STREETS

(No. 6723—Chairman, Subcommittee on Health—M. H. F.—July 18, 1930—8½ pp.)

The sale of ice cream on city streets is legal.

The city has the power to regulate the sale or distribution of ice cream on its streets.

The city may prohibit the sale of ice cream upon its streets, if necessary for health or traffic reasons, and if it is uniformly applied without discrimination.

Citations:

- Statutes:** SH '29, 24: 65 (.3, .8, .14, .19, .40, .49, .52, .65, .74, .77, .90, .101).
Ordinances: Coun. J. (1909-10), p. 2099.
Id. (1930-31), p. 3216 (Retail food establishments ordinance).
Code '22: 2924-37, 3735-36.
Cases: City of Rockford v. Nolan, 316 Ill. 60 (1925).
Chicago v. Bartell, 100 Ill. 57 (1881).
Other references: Opinion of the Corporation Counsel, Coun. J. (1909-10), p. 1862.
Opinion No. 6685 (this volume, p. 537).

OPINION OF FOREGOING SYNOPSIS

In your communication of recent date you state that your subcommittee has under consideration an ordinance prohibiting the sale of ice cream on various streets and street intersections in the city, and you ask this department to advise you regarding the following:

(1) Is it legal to sell or distribute ice cream on the streets of the City of Chicago?

(2) What are the powers of the City Council relative to regulating or prohibiting the sale of the same?

Answering the first question propounded, we do not find any state law or municipal ordinance which prohibits the sale or distribution of ice cream on the streets of Chicago and, therefore, we are of opinion that it is legal to sell such commodity on the city's streets.

In answer to your second question, the source of the City Council's power is the Cities and Villages act. (Chap. 24, Smith-Hurd Illinois Revised Statutes, 1929.) In article V of this act the City Council is delegated the following, among other, express powers:

To fix the amount, terms and manner of issuing and revoking licenses. (Clause 4.)

To regulate the use of the streets. (Clause 9.)

To regulate and prevent the throwing or depositing of ashes, offal, dirt, garbage, or any offensive matter, in and to prevent injury to, any street, avenue, alley or public ground. (Clause 15.)

To regulate traffic and sales upon the streets, sidewalks and public places. (Clause 20.)

To license, tax, regulate, suppress and prohibit hawkers and peddlers, and to revoke such licenses at pleasure. (Clause 41.)

To regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables,

and all other provisions, and to provide for place and manner of selling the same and to control the location thereof. (Clause 50.)

To provide for and regulate the inspection of meats, poultry, fish, butter, cheese, lard, vegetables, cotton, tobacco, flour, meal and other provisions. (Clause 53.)

To regulate the police of the city and pass and enforce all necessary police ordinances. (Clause 66.)

To declare what shall be a nuisance and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist. (Clause 75.)

To do all acts, make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease. (Clause 76.)

To tax, license, and regulate ice cream parlors. (Clause 91.)

To direct, license and control all wagons and other vehicles conveying loads within the city, or any particular class of such wagons, and other vehicles. (Clause 96.)

To pass all ordinances, rules and make all regulations, proper or necessary, to carry into effect the powers granted to cities. (Clause 102.)

While the city is a creature of the state legislature and has only such powers, either express or implied, as are vested in it by the legislature, the municipality's legislation may be based upon one or a combination of grants of power. The courts have held that the express enumeration of occupations or businesses, not nuisances *per se*, over which the city is given control, excludes all others, but the power to legislate on a given subject may be derived from several items of enumeration. (*City of Rockford v. Nolan*, 316 Ill. 60.) * * *

Under the grants of authority hereinbefore mentioned, we are of opinion that the City of Chicago has the power to regulate the sale or distribution of ice cream on its streets. By clause 20 the city is given express authority to regulate traffic and sales upon its streets, and the purveying or dispensing of ice cream upon the streets is, in our judgment, trafficking and selling upon the streets, such as the city has direct power to regulate. The city also has power, given by clause 41, to license and regulate peddlers. Those selling ice cream from vehicles being operated on the streets are "peddlers" within the definition of that term as used in said clause. The Illinois Supreme Court has held that the term "peddler," in the above clause, is used in its general and unrestricted sense. (*City of Chicago v. Bartee*, 100 Ill. 57.) Furthermore, ice cream is a food product, which in our judgment would be included within the phrase "other provisions," used in clauses 50 and 53, which clauses give the city the right to regulate the sale of provisions, and to provide for the place and manner of selling the same and to control the location thereof. Again, under the health power (clause 78) and the police power (clause 66) the city, undoubtedly, has the authority to promote the health of the inhabitants of Chicago by proper regulations calculated to prevent the sale of deleterious foods and food products.

The question whether the city has the power to prohibit the sale of ice cream on the streets is a more difficult question to answer. Clause 41 gives the city power, power not only to license, tax and regulate peddlers, and to revoke licenses at pleasure, but also power to suppress and prohibit peddlers. The literal reading of this clause seems to leave no doubt concerning the city's absolute authority to suppress and prohibit all peddlers. The question then presents itself whether an ordinance prohibiting the peddling and sale of ice cream upon the streets would be sustained in the courts. Objection might be raised on the ground of unlawful discriminations against ice cream and in favor of other foods no less nutritious and healthful. Were the ordinance not to prohibit all peddlers of and all peddling in food products, such an

attack upon the ordinance might be successful, unless the city were prepared to furnish convincing proof that, due to a health hazard involved, the prohibition of all peddling and street sales of ice cream were necessary to promote the health of inhabitants and prevent and suppress disease. Upon this matter of health hazard—which presents a question of fact, rather than law it is our thought that you should be guided by the recommendation of the city's Department of Health. Should the health department regard all sales of ice cream upon the streets detrimental to health, and the City Council were to declare such selling to be a nuisance, considerable help in sustaining the ordinance might be found under the 75th clause of the Cities and Villages act, which clause gives the municipality authority to declare what shall be a nuisance and to abate the same.

* * * * *

In order to prevent traffic congestion we believe the City Council may go far in legislating under the city's power to regulate traffic and sales upon the streets, sidewalks and public places, and passing regulations to prohibit peddlers and peddling on certain designated streets and in certain congested localities. Such regulations or ordinances, however, should be uniform in their operation, applicable to all persons similarly situated, and not open to attack on the ground of unlawful discrimination.

* * * * *

SALE OF MERCHANDISE ON STREETS, ALLEYS AND SIDEWALKS*

(No. 7031—Chairman of Subcommittee on Local Industries, Streets and Alleys—M. H. F. and C. J. A.—July 28, 1931—2 pp.)

Under its power to regulate the use of streets, the city may prohibit the sale of merchandise to, or the soliciting of business from, pedestrians, passers-by and persons in vehicles on streets, alleys and sidewalk on behalf of any business adjoining or near the sidewalk.

Citation:

Ordinance: Code '31: 1008-09.

Opinion No. 7189 of October 15, 1931 to the Commissioner of Police also discusses street vending.

Regulating Selling on Streets: A city ordinance prohibiting the sales of any articles, except daily newspapers, on the streets or public places within the Loop and Wilson avenue districts was held valid by the Illinois Supreme Court. The ordinance was held to be reasonable and not discriminatory.—*Chicago v. Rhine*, 363 Ill. 619 (1936).

"Pulling" and "street hawking" in the Halsted-Roosevelt district was declared a nuisance and enjoined. Sections 1008 and 1009 of the Revised Code declared such practices to be unlawful.—*Edelman Bros. v. Baikoff*, 277 Ill. App. 432 (1934).

*See also Opinion No. 8760, p. 371, on selling from vehicles on public streets and opinions, p. 538, on licensing peddlers.

USE OF SIDEWALKS BY SHOESHINERS

(No. 8186—*L. H.*—October 13, 1933—2 pp.)

No ordinance prohibits shoeshiners from occupying sidewalks for the purpose of shining shoes when they do not maintain stands on streets or sidewalks.

OPERATION OF PORTABLE SKY PROJECTOR ON STREETS

(No. 8816—*Commissioner of Police—O. F. W.*—July 17, 1935—1½ pp.)

The operation of a portable sky projector throughout the city, being an extraordinary use of the city's streets, is properly subject to regulation by the city, but as yet no ordinances have been passed on the subject.

USE OF STREETS TO CARRY ADVERTISING SIGN*

(No. 7649—*Commissioner of Police—R. N.*—July 14, 1932—1 p.)

A man in motion carrying an advertising sign on his back comes within the prohibition against the use of sidewalks, alleys or streets for advertising or soliciting business.

Citation:

Ordinance: Code '31: 1008-09.

USE OF STREETS FOR ADVERTISING*

(No. 7728—*Jud. G.*—August 23, 1932—2½ pp.)

The City Council has no power to sanction the use or encroachment of public streets for private purposes, as by advertising devices, since the public is entitled to the full use and enjoyment of public streets.

Citation:

Case: *People v. Clean Street Co.*, 225 Ill. 482 (1907).

USE OF NEWSPAPER STANDS FOR ADVERTISING*

(No. 8283—*Chairman, Committee on Finance—L. H.*—January 25, 1934—4 pp.)

The use of newspaper stands for advertising purposes is unlawful, since the city may not devote the use of any portion of the streets to the benefit of private persons and the business is not one impressed with a public use.

Citations:

Cases: *Fifth Avenue Coach Co. v. New York*, 194 N. Y. 19 (1909).
People v. Clean Street Co., 225 Ill. 470 (1907).

*See opinions, pp. 409-411, on the regulation of advertising.

DISTRIBUTION OF PUBLICATIONS ON STREETS

(No. 7281—*Commissioner of Police—L. H.—November 10, 1931—2 pp.*)

The distribution in the loop of copies of a publication not purporting to be a daily newspaper is lawful, if a permit is issued for that purpose, as this circulation does not amount to vending on the streets.

Citations:

Ordinances: Code '31: 974, 1007.

OUT-OF-TOWN NEWSPAPER STAND IN LOOP

(No. 8068—*Commissioner of Public Works—C. N.—May 18, 1933—2 pp.*)

The City Council, by ordinance, having restricted the sale of newspapers in the downtown section of Chicago to newspapers printed and published in Chicago, it cannot by an order direct the issuance of a permit for an out-of-town newspaper stand in that area, but must enact a special ordinance.

Citations:

Ordinances: Code '31: 974, 990.

SALES OF MAGAZINES FROM NEWS STANDS

(No. 7737—*Commissioner of Police—L. H.—September 1, 1932—3½ pp.*)

A person selling newspapers from news stands on city streets under a permit from the Commissioner of Public Works may not sell or offer for sale any magazines from the stand and the Commissioner of Public Works may revoke the permit because of the sale of such extraneous matter.

Citation:

Ordinance: Code '31: 990.

Opinions No. 8319 of March 5, 1934, to the Mayor and No. 8334 of March 16, 1934, to the Commissioner of Streets and Electricity also deal with the subject of selling newspapers.

USE OF STREETS FOR "STOP AND SOCK" GOLF

(No. 8508—*Commissioner of Buildings—W. L. S.—September 28, 1934—1 p.*)

Public thoroughfares cannot be used for the purpose of hitting golf balls into them in connection with the operation of a private "Stop and Sock" golf course.

Opinion No. 8509 of September 28, 1934, to the Commissioner of Police is in accord with the above opinion.

SOLICITATION OF BUSINESS FROM DOORWAY

(No. 8318—*A. F. G.—February 26, 1934—3½ pp.*)

The solicitation of business from a doorway or a vestibule of a store, unless it interferes with the public use of sidewalks, does not violate the City Code.

Citations:

Ordinance: Code '31: 1008-09, as amended July 30, 1931, p. 1009.

Cases: Brauer v. Baltimore Refrigerator Co., 66 L. R. A. 403 (1904).

Callagan v. Gilman, 107 N. Y. 360 (1887).

Other references: Op. Corp. Counsel (1911-12), p. 1111.

28 Encyclopedia of Law and Procedure 659.

MERCHANT'S MOVABLE DISPLAY STAND ON SIDEWALKS

(No. 8832—*Commissioner of Police—E. M. S.—July 27, 1935—3 pp.*)

A merchant may have a movable display on the sidewalk adjacent to his place of business if he obtains a permit.

Citations:

Ordinance: Code '31: 973.

Cases: Flynn v. Taylor, 127 N. Y. 596 (1891).

Tolman and Co. v. Chicago, 240 Ill. 268 (1909).

Other reference: McQuillin, Mun. Corp., sec. 1438.

DISPLAY STANDS ON PRIVATE PROPERTY

(No. 8222—*Alderman, 5th Ward—C. N.—November 20, 1933—2½ pp.*)

A tenant who displays his wares on private property does not violate the ordinance prohibiting sidewalk display stands.

Citations:

Ordinance: Code '31: 973.

Cases: Illinois Malleable Iron Co. v. Lincoln Park Commissioners, 283 Ill. 446 (1918).

Hester v. Durham Traction Co., 138 N. C. 288 (1905).

City of San Antonio v. Walters, 253 S. W. 544 (Tex., 1923).

LICENSES FOR LESSEES OR PERMITEES OF PUBLIC PROPERTY*

(No. 8062—*Superintendent, Bureau of License*—M. H. F.—May 16, 1933—2 pp.)

A rental fee or consideration paid for a permit to occupy street corners or other public property does not exempt street merchants from procuring city licenses where the businesses carried on by them are otherwise subject to license.

LICENSES FOR STANDS ON PUBLIC STREETS*

(No. 6983—*Commissioner of Police*—M. H. F.—July 2, 1931—4 pp.)

The issuance by the Department of Compensation of a permit for a vending stand merely confers upon the person to whom the permit is issued, the privilege to occupy the public street or property designated in the permit. If a person is engaging in a business required by ordinance to be licensed, he must obtain a license in addition to the permit from the Department of Compensation and is subject to all the ordinances regulating that business.

Citations:

Ordinances: Code '22: 2013, 2591-95A, 2924-37, 3258, 3258A-58G, 3725-26.

PRIOR RIGHT IN STREET FOR SEWER AND SANITATION PURPOSES†

(No. 7309—*Commissioner of Public Works*—C. J. A.—November 21, 1931—1½ pp.)

The maintenance of a water tunnel by an elevated railroad is subject to the superior right of the city to use the streets for sewer and other sanitation purposes and it is incumbent upon the railroad to move such water main when it interferes with a use of the streets by the city for the above purposes.

BOND AND CASH DEPOSIT REQUIREMENTS FOR STREET OPENING

(No. 7529—*Commissioner of Public Works*—L. H.—April 7, 1932—6½ pp.)

The city's executive officers must follow the requirements of the city ordinances that call for a bond and cash deposit in issuing per-

*See Opinion No. 8381, p. 450, on licensing a permanent use of the streets.

†See also Opinion No. 7551, p. 636.

mits for openings in streets, since these ordinances are designed to protect the city from damage claims.

Citations:

- Ordinances: Hoover, Spec. Ord. (1915), p. 208.
Code '31: 739, 741.
Case: Welch v. Chicago, 323 Ill. 458 (1927).

REMOVAL OF ELECTRICAL EQUIPMENT CONSTRUCTED WITHOUT PERMIT

(No. 6942—Acting Commissioner, Gas and Electricity—C. J. A.—June 11, 1931—1½ pp.)

The erection of poles, wires or electrical conductors on, over or under any street or public place without a permit from the Commissioner of Public Works is prohibited and subject to penalty under the ordinances.

By virtue of the above power, the city may force the removal of smoke stack guy wires erected without a permit and strung over and adjacent to high tension electric wires on streets and other public property.

Citations:

- Ordinances: Code '22: 3770, 3777.

BANNERS OR SIGNS ON STREETS

(No. 7150—F. J. B.—September 28, 1931—3 pp.)

A private structure, such as cloth banners and signs, cannot be placed in or upon a public street or sidewalk as a matter of right; the issuance of permits for such structure is within the discretion of the Commissioner of Public Works.

Citations:

- Ordinances: Code '31: 954, 962, 963.
Case: Hibbard and Co. v. Chicago, 173 Ill. 91 (1898).

BRIDGES, TANKS AND VAULTS IN STREETS

(No. 8413—Superintendent of Compensation—E. L. M.—May 29, 1934—12 pp.)

The authority of the City Council by ordinance is necessary for the maintenance of any bridges, tanks or vaults in public streets or alleys. The city should take action to remove any bridge, tank or vault lo-

cated in the public streets. unless an ordinance is enacted by the City Council authorizing the maintenance thereof.

Private title to lands held by a municipal corporation for a public use cannot be acquired by adverse possession.

Citations:

Constitution: Illinois, amendment VI.

Statute: Cah. 33, 24: 295.

Cases: Gerstley v. Globe Wernicke Co., 340 Ill. 270 (1931).

Chicago v. Reeves, 220 Ill. 274 (1906).

Gulick v. Hamilton, 293 Ill. 126 (1920).

Close v. Chicago, 257 Ill. 47 (1912-13).

Owen v. Village of Brookport, 208 Ill. 35 (1904).

Shirk v. Chicago, 195 Ill. 298 (1902).

Chicago v. Middlebrook, 143 Ill. 265 (1891-92).

County of Platt v. Goodell, 97 Ill. 84 (1880-81).

City of Alton v. Illinois Transportation Co., 12 Ill. 38 (1850-51).

Opinions No. 6897 of May 7, 1931 and No. 6873 of April 23, 1931, both to the Division Marshal in charge of fire prevention discuss the same point as above opinion.

USE OF SPACE BENEATH STREETS—OPTIONAL PERMITS FOR CURB GASOLINE PUMPS*

(No. 7308—Mayor—L. H.—November 20, 1931—1½ pp.)

The ordinance of the city regarding the installation and operation of curb gasoline pumps, which provides for the granting or withholding of permits at the option of the City Council, is not valid. A general ordinance must give the same rights to all persons.

The City Council has the right to pass ordinances authorizing the use of space beneath the streets, but it must confine itself to such use as will not interfere with the use of these streets by the public.

COMPENSATION FOR USE OF SPACE UNDER STREETS AND ALLEYS†

(No. 8532—Superintendent of Compensation—W. L. S.—October 22, 1934—11 pp.)

When the city acquires private property for a street or alley by condemnation proceedings, it acquires only an easement unless it is given a deed to the fee by the abutting property owners; in the absence of such deed, the city cannot require any compensation from abutting property owners for the maintenance of tunnels and vaults thereunder.

*See annotation "Curb Pump License," p. 525.

†See also Opinion No. 8939, p. 656, on the use of space beneath streets over which the state exercises jurisdiction.

Where the city owns the fee to a street or an alley it may charge reasonable compensation for the use of space under such street or alley.

Citations:

Ordinances: Coun. J. (1910-11), p. 471.

Id. (1911-12), p. 955.

Cases: Sears v. Chicago, 247 Ill. 204 (1910-11).

Sanitary District v. Commonwealth Edison Co., 357 Ill. 255 (1934).

Tacoma Safe Deposit Co. v. Chicago, 247 Ill. 192 (1910-11).

COMPENSATION FOR VAULT PAID UNDER MISTAKE OF FACT

(No. 7323—*Committee on Finance—S. A. M.—November 27, 1931—2½ pp.*)

Compensation paid to the city through a mutual mistake of fact, in this instance, for a vault under what was believed to be city property but which was actually private property, is recoverable.

Citations:

Ordinance: Coun. J. (1928-29), p. 4928, sec. 2.

Case: Wolf v. Jacob Beaird, 123 Ill. 590 (1887-88).

SURETY'S LIABILITY UNDER DRIVEWAY AND VAULT OPENING ORDINANCES

(No. 8129—*Mayor—J. F. G.—July 25, 1933—2½ pp.*)

The ordinances governing the permits for driveways and vault openings are defective in that they are personal and do not run with the land. These ordinances should be amended in such a way that the conveyance of the premises in relation to which the permits are issued, would not terminate the liability on the surety bond.

REGULATION OF CANOPIES

(No. 7305—*Alderman, 43rd Ward—W. L. S.—November 19, 1931—2½ pp.*)

The City Council has authority to pass an ordinance regulating the issuance of permits for the construction of canopies, and no official of the city has the right to waive the requirements of this ordinance.

Permits for the construction of canopies may be revoked by the City Council at any time without the consent of the grantee or by the Commissioner of Compensation, if the grantee fails to comply with the city ordinance regulating canopies, or if the Commissioner of Public Works determines such revocation to be necessary and proper.

Citations:

Ordinances: Code '31: 946-953.

CANOPY PERMIT REQUIREMENTS AND FEE*

(No. 7142—*Commissioner of Compensation—J. L.—September 23, 1931—2 pp.*)

The city may require advance payment of a canopy permit for a ten year period. The canopy is expected to be in the nature of a permanent fixture, and must comply with certain fire prevention and safety requirements.

Citations:

Ordinance: Code '22: 3287.

Case: Village of Riverton v. Horn, 176 Ill. App. 433 (1912).

REFUNDS OF CANOPY PERMIT FEE*

(No. 7831—*Chairman, Committee on Finance—M. L. M.—December 9, 1932—2½ pp.*)

Where compensation for ten years is paid in advance for a permit for a ten year period, as is required by the ordinance dealing with the erection and maintenance of canopies, it is within the discretion of the City Council to refund the unearned portion for the period after which the canopy is no longer maintained.

Monies voluntarily paid to a municipality for a license or permits cannot be recovered even though the city had no right to impose the fee.

Citations:

Ordinances: Code '31: 948, 950, 951.

Coun. J. (1930-31), p. 4156.

Other reference: Dillon, Mun. Corp. (5th ed.), sec. 1621.

LIABILITY OF SURETY UNDER CANOPY PERMIT BOND

(No. 8568—*Superintendent of Compensation—O. W. H.—November 21, 1934—1 p.*)

The city may look to the surety for the payment of canopy compensation for the entire period if default is made by the owner and, at the termination of the period, the city may insist upon the removal of the canopy by the surety at its own expense.

REMOVAL OF CANOPY CONSTITUTING PUBLIC ENCROACHMENT

(No. 7351—*Commissioner of Compensation—W. L. S.—December 8, 1931—2½ pp.*)

Where a canopy or awning over a sidewalk is so constructed that it amounts to an encroachment on public property and where a neigh-

*See also Opinion No. 7056, p. 373, on the recovery of a canopy permit fee.

boring property owner has obtained mandamus for its removal, the Commissioner of Compensation should revoke the permit and order a removal.

Citation:

Case: *City v. Danville*, 242 Ill. App. 472 (1926).

LOADING AND UNLOADING FROM SIDEWALKS

(No. 8688—*Alderman, 45th Ward*—February 28, 1935—3 pp.)

A person may reasonably obstruct the sidewalk, if it is necessary for the transaction of business; but if that obstruction unreasonably interferes with the rights of the public so that it becomes a public nuisance, the city may enforce the proper ordinances to effect a removal of the obstruction. There is no law which compels a person to load and unload from an alley instead of a sidewalk.

Citations:

Ordinances: Code '31: 971.

Uniform traffic code, art V, sec. 19 (as amended July 11, 1933), art. IX.

Case: *Tolman and Co. v. Chicago*, 240 Ill. 268 (1909).

USE OF STREETS AND SIDEWALKS FOR LOADING PLATFORM

(No. 8365—*Chairman, Committee on Finance*—A. F. G.—April 14, 1934—3½ pp.)

Streets and sidewalks are held by the city in trust for the benefit of the public and the city has no power to grant the use of public streets and sidewalks for private purposes, as for the construction of loading platforms, even if compensation therefor is charged.

Citations:

Cases: *Chicago Cold Storage Co. v. People*, 224 Ill. 287 (1906-07).

People v. Western Storage Co., 287 Ill. 612 (1919).

People v. Wolper, 350 Ill. 461 (1933).

SNOW AND ICE REMOVAL BY SIDEWALK PERMITEES*

(No. 8609—*Superintendent, Bureau of Streets*—C. N.—December 31, 1934—2 pp.)

While the city cannot compel a property owner or a lessee of property to remove snow and ice from the sidewalk when a special permit has been granted under bond for a special use of parts of the sidewalk, the city should do all within its power to obtain the co-operation of the permittee to eliminate such accident hazards.

Citation:

Case: *Gridley v. City of Bloomington*, 88 Ill. 554 (1878).

*See also Opinion No. 8594, p. 655.

C. RIVERS, LAKES AND HARBORS

REGULATION OF BOATS ANCHORED IN LAKE MICHIGAN

(No. 8834—*Commissioner of Police—W. V. D.—August 6, 1935—2½ pp.*)

The city may compel the owners or operators of a boat anchored in the Lake, one mile northeast of Navy Pier, to procure licenses for the sale of liquor and cigarettes and to enforce its ordinances and the statutes of the state on gambling.

Citations:

Statute: SH '33, 24: 83.

Cases: Canada Atlantic Transit Co. v. Chicago, 210 Fed. 7 (1913).
Chicago v. McGinn, 51 Ill. 266 (1868-69).

OPINION OF FOREGOING SYNOPSIS

In reply to your letter of July 23, 1935, requesting an opinion as to the jurisdiction of the city over the Show Boat anchored in Lake Michigan about one mile northeast of the Navy Pier, please be advised that subject to the paramount authority of Congress over commerce and the navigable waters of the United States, a state has full power to legislate concerning the use of navigable waters which are within the territorial limits of the state without regard as to whether or not they connect with waters outside such limits. In other words, the power of the state is plenary until the federal government sees fit to exercise its constitutional prerogative.

It is recognized that the states have powers of control and regulation over navigable waters which can be exercised as a matter of local or state policy without interfering with the right of navigation and which are, or should be, exempt from federal interference.

Ordinarily a municipal corporation has no power to supervise, control, regulate or direct the uses of navigable waters, those being matters for appropriate action by the federal or state authorities but such power may be conferred upon a municipality and in that case, its reasonable ordinances regulating the use of navigable waters within the limits prescribed by statute have the validity of state action.

Canada Atlantic Transfer Co. v. Chicago, 210 Fed. 7, 9.
Chicago v. McGinn, 51 Ill. 266.

This jurisdiction has been conferred by the State of Illinois upon the City of Chicago; paragraph 83 of Chapter 24 of Smith-Hurd's Illinois Revised Statutes of 1933, which reads as follows:

"Jurisdiction Over Waters—Street Labor. Sec. 111. The city or village government shall have jurisdiction upon all waters within or bordering upon the same, to the extent of three miles beyond the limits of the city or village, but not to exceed the limits of the state; and may, by ordinance, require every able-bodied male inhabitant, of such city or village, above the age of twenty-one years and under the age of fifty years (excepting paupers, idiots, lunatics, and such other as are exempt by law), to labor on the streets and alleys of such city or village, not more than three days in each year, but such ordinance shall provide for com-

mutation of such labor at not more than one dollar and fifty cents per day."

Under the delegation of power by the state, the city has ample authority to compel the owners or operators of the Show Boat to procure licenses for the sale of liquor and cigarettes and the police have the authority to enforce the statutes of the State of Illinois and the ordinances of City of Chicago relating to gambling.

* * * * *

TRANSPORTATION OF INFLAMMABLE LIQUIDS ON CHICAGO RIVER*

(No. 8865—Division Marshal in charge of Fire Prevention—J. K. C.—
September 4, 1935—3 pp.)

The Bureau of Fire Prevention should not act with reference to the transportation and handling of volatile inflammable liquids on the Chicago river, for such regulatory ordinance may be invalid because conflicting with powers and rights of the federal government. Commerce over all navigable waters is under the jurisdiction of the federal government, and the federal statutes contain specific regulations relative to fire hazards.

Citations:

Statute: USCA, Title 46, secs. 463-476.

Cases: Gilman v. Philadelphia, 70 U. S. 713 (1865).
Cummings v. Chicago, 188 U. S. 410 (1902).
Dupont v. Miller, 310 Ill. 140 (1924).

OPINION OF FOREGOING SYNOPSIS

We have your communication of August 26, 1935, in which you request our opinion in regard to the jurisdiction and authority of the Bureau of Fire Prevention and the procedure that should be taken by said bureau in reference to the transportation and handling of volatile inflammable liquids, especially gasoline, on the Chicago river.

The Supreme Court of the United States by virtue of the provision of the federal constitution giving Congress the power to regulate interstate commerce has held that jurisdiction over all navigable waters was vested in the Congress of the United States and that all commerce upon said waters was likewise under the jurisdiction of the United States.

In the case of Gilman v. Philadelphia, 70 U. S. 713, the Supreme Court of the United States said:

"Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the states or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the states before the adoption

*See also Opinion No. 8795, p. 6.

of the national constitution, and which have always existed in the parliament in England.

"It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided."

Although Congress has the paramount authority to regulate the use of all navigable waters within the United States, nevertheless this authority is also vested in the states and may be exercised by states concurrently with Congress unless Congress has indicated an intention to exclude the jurisdiction of the states, or unless regulations of the state conflict with those of Congress (*Cummings v. City of Chicago*, 188 U. S. 410; *Dupont v. Miller*, 310 Ill. 140).

The City of Chicago has been delegated quite general police power over the navigable waters lying within its jurisdiction but our ordinances contain no regulations relative to fire prevention in such waters. The ordinances of the City of Chicago creating the harbor master and giving him general police power over the harbor do not contain fire regulations. The reason for the lack of such municipal regulations probably is due to the fact that the federal statutes contain specific regulations over navigable waters and particularly with respect to fire prevention. Sections 7436 to 7449, inclusive, of Barnes' Federal Code of 1919 (sections 463 to 476, inclusive, of title 46 of United States Code, compact edition of 1928) contain specific regulations relative to fire hazards and as to the mode of packing dangerous articles, including gasoline.

We are of the opinion that since commerce over all navigable waters is under the jurisdiction of the United States and since the federal statutes contain specific regulations relative to fire hazards an ordinance passed by the City of Chicago to regulate the transportation and handling of inflammable liquids on the Chicago river and on the waters of Lake Michigan adjoining the City of Chicago might be held invalid. We therefore advise you that you notify the federal authorities of this fire hazard and request them to take such action as the law provides.

BOAT AND LIQUOR LICENSE FOR BOAT MOORED IN LAKE MICHIGAN

(No. 8868—*Commissioner of Police—M. H. F.—September 9, 1935—*
3½ pp.)

A boat moored in the Michigan slip at the foot of East Randolph street is under the jurisdiction of the Liquor Control Commissioner of the city and under the general license authority of the city.

A club which occupies quarters in a structure which may be considered a boat that floats upon navigable waters in the state and that operates a restaurant in the boat, is not entitled to a boat license issued under the Illinois Liquor Control act, as the boat is not a passenger boat regularly operated as a common carrier.

The city has jurisdiction of all waters within or bordering on it to the extent of three miles beyond the city's limits, but not exceeding the limits of the state.

Citations:

Statutes: ISBS '35, 24: 65 (111).

Ill. Laws (sp. sess. 1933-34), pp. 64, 66 (Liquor Control act, art. III, sec. 13; art. V, sec. 1(f)).

Other reference: Opinion No. 8834 (this volume, p. 686).

CITY'S CONTROL OVER DOCKAGE FACILITIES*

(No. 8060—*Secretary, Committee on Harbors, Wharves and Bridges—C. N.—May 15, 1933—2½ pp.*)

Except for certain restrictions specified in the City Code, no blanket authority exists by which the city can interfere with the acquisition and use of dockage facilities lawfully leased.

The Michigan Central Railroad Company has the right to lease a part of its property including dockage for passenger steamships without the consent of the city.

Citations:

Ordinances: Code '31: 1081-99.

**CONSTRUCTION AND CONTROL OF RIVER TAXI LANDINGS—
REGULATION OF WATER CRAFT FARES**

(No. 7773—*Alderman, 1st Ward—J. F. G.—October 11, 1932—2 pp.*)

The city has power to construct landing places for river taxis, subject to the consent of the Secretary of War and of the State Department of Public Works and Buildings.

If public landing places are provided and river taxis use those places as points of origin and destination while carrying passengers for hire, they may become subject to the control of the Illinois Commerce Commission.

There is no provision delegating to the city the right to regulate the fares of water craft.

Citations:

Statutes: Cah. '31: 19, 82.

Id. 24: 65 (32, 33, 36, 37).

Public Utilities act, sec. 10.

Case: Cummings v. Chicago, 188 U. S. 410 (1902).

CONSTRUCTION OF BRIDGES OVER CHICAGO RIVER

(No. 8236—*Commissioner of Public Works—L. H.—December 12, 1933—3 pp.*)

Congress may regulate and prohibit the construction of bridges over navigable waters. This power has been delegated by Congress to the Secretary of War, who has power to approve or reject specifications of a proposed new bridge over the Chicago river.

Citations:

Case: Canada Atlantic Transit Co. v. Chicago, 210 Fed. 7 (1913).

Other reference: 45 CJ 420, 427.

*See also Opinion No. 6451, p. 673, on the repair of docks abutting on city property.

CONTROL OVER CHICAGO RIVER BRIDGES

(No. 7711—*Acting Fire Commissioner—M. H. F.—August 12, 1932—*
4½ pp.)

The Chicago river and its branches are navigable waters of the United States, over which Congress in the exercise of its commerce powers may exercise control, but until Congress acts, the state has plenary authority over bridges across them and power to vest in the City of Chicago jurisdiction over the construction, repair and use of those bridges within the city, and this jurisdiction has been delegated to the city.*

Every Chicago river bridge tender in the City of Chicago is obliged to open the bridge as soon as practicable whenever, upon any alarm of fire, any fireboat should approach and sound the proper signal.

The Commissioner of Public Works has authority to control the opening and closing of railroad bridges over the Chicago river located within the city.

Control over railroad bridges on the Chicago river or any of its branches is now vested in the City Engineer under the direction of the Commissioner of Public Works.

Citations:

Statutes: SH '31, 24: 65.37, 598-621.

Ordinances: Code '31: 2857.

Coun. J. (1931-32), p. 1569.

Id. (1932-33), p. 2813.

Case: Escanaba and L. M. Transportation Co. v. Chicago, 107
U. S. 678 (1882).

MAINTENANCE OF CERTAIN DEPTH OF CHICAGO RIVER

(No. 7921—*Commissioner of Public Works—W. L. S.—January 30,*
1933—3½ pp.)

The city is not required by law to maintain any particular depth in any section of the Chicago river, but if in obtaining a permit from the state or federal government it has agreed to maintain a certain depth then it must do so.

The state is not required to maintain any particular depth in the Chicago river over which the federal government has relinquished jurisdiction, though it has broad powers in this connection.

The federal government is not required by law to maintain any particular depth in the Chicago river in sections thereof over which it retains jurisdiction, but it has assumed such obligations in the interest of navigation.

*See Opinion No. 8236, p. 689.

The city has no authority to deliberately fill up any portion of the Chicago river.

Citations:

- Other references: Op. Corp. Counsel (1920-23), p. 259.
15 Id., p. 538.
16 Id., p. 167.
Id. (1925-26), p. 391.

REMOVAL OF OBSTRUCTIONS AND DREDGING OF CHICAGO RIVER—DISPOSAL OF SEWAGE

(No. 8562—*Commissioner of Public Works—M. H. F.—November 16, 1934—8½ pp.*)

Unless required by statute or unless it has caused the obstructions, a municipal corporation is not bound to remove obstructions from a stream running through its boundaries.

The city is under no duty or legal obligation to dredge any portion of the Chicago river so as to maintain therein any specific depth of water.

The disposal, by dumping into the Chicago river, of solid matter or any refuse of any kind other than that flowing from streets and sewers in a liquid state, is illegal.

Citations:

Statute: USCA, Title 33, sec. 427.

- Cases: Walsh v. Chicago, 201 Ill. App. 584 (1903).
Goodrich v. Chicago, 20 Ill. 445 (1858).
Goodrich v. Chicago, 72 U. S. 566 (1866).
Faust v. City of Cleveland, 121 Fed. 810 (1903).
Maryland v. Miller, 180 Fed. 796 (1910).
Coonley v. City of Albany, 132 N. Y. 145, 130 N. E. 382 (1892).
O'Donnell v. City of Syracuse, 184 N. Y. 1, 76 N. E. 738 (1906).
Seaman v. New York, 80 N. Y. 239 (1880).
City of Maysville, v. Brooks, 145 Ky. 526 (1911).

Other references: 45 CJ 452.

- 6 McQuillin, Mun. Corp. (2nd ed.), sec. 2875.
64th Congress (1st sess.) House Document, No. 1294.

REMOVAL OF GARBAGE AND WASTE FROM CHICAGO RIVER

(No. 7602—*President, Board of Health—C. J. A.—June 11, 1932—2½ pp.*)

The Board of Health is not required by law to undertake either the dredging of the Chicago river or the removing of waste and garbage from it.

The Department of Public Works has general control of the Chicago river within the city's limits and of sewage disposal, and may

remove any objectionable matter in the river or obstructions to its free flow.

The Sanitary District of Chicago must treat sewage, which has been dumped into the river by other municipalities outside of the city, to check odors from it.

Citations:

Ordinances: Code '31: 156, 161, 209, 211, 2827.

**ADMIRALTY JURISDICTION OVER LAND AND STRUCTURES
ATTACHED TO IT***

(No. 7180—*Harbor Master, Navy Pier*—F. J. B.—October 8, 1931—
2 pp.)

Admiralty has no jurisdiction over damage to land or the structures attached to it, including docks, piers and wharves, even though arising on navigable waters, and an action to recover for a submarine cable at the Navy Pier is one at common law and not an admiralty suit.

**RIGHTS OF ABUTTING PROPERTY OWNERS IN THE CHICAGO
RIVER—FILLING IN OF NAVIGABLE STREAM BY CITY**

(No. 6448—*Chairman, Committee on Local Industry, Streets and
Alleys*—R. N. L.—June 10, 1929—2 pp.)

Each property owner along the Chicago river owns to the center of the stream, subject to an easement in the public for the purposes of navigation, and the land created by filling in the river belongs to the abutting property owners.

° The city cannot charge compensation for the filling in of slips, except by agreement with the party owning the slip.

The city cannot fill in a navigable stream without the permission of state and federal authorities.

Citations:

- Cases: Chicago v. McGinn, 51 Ill. 266 (1868-69).
People v. Cairo, 47 Ill. 384 (1868).
Hunter v. Middleton, 13 Ill. 50 (1851-52).
Canal Trustees v. Havens, 11 Ill. 554 (1849-50).
Washington Ice Co. v. Shortall, 101 Ill. 46 (1881-82).
People v. Economy Power Co., 241 Ill. 290 (1890).
Economy Light and Power Co. v. United States, 256 Fed. 792 (1919).
Economy Light and Power Co. v. United States, 256 U. S. 113 (1921).

*See also Opinion No. 6451, p. 673, on the repair of docks abutting on city property.

RIGHTS OF ABUTTING PROPERTY OWNERS IN CANAL "A" WHEN FILLED IN

(No. 8896—*Commissioner of Public Works—C. H. L.—October 15, 1935—24½ pp.*)

The Commissioner of Public Works must obtain an authorization from the Secretary of War and from the Division of Waterways of the State of Illinois as well as the consent of the abutting property owners before proceeding with the work of filling in canal "A," located at 2352 So. Ashland avenue. Canal "A" is a navigable waterway in which the public has an easement. The owners of all lots bordering on the canal have the right of access to the south branch of the Chicago river by way of the canal, and cannot be deprived of that right without their consent.

If the part of canal "A" under discussion is filled in, the abutting land owners on the east and west sides of the canal hold title to the center of the bed of the part filled in.

Citations:

Statutes: ISBS '35, 19: 18, 24, 26.

Rev. Stat. of Illinois, 1845, ch. 25, div. 1, sec. 17.

Cases: Warren v. Jacksonville, 15 Ill. 240 (1853-54).

Rees v. Chicago, 38 Ill. 337 (1865).

Moffett v. South Park Commissioners, 138 Ill. 620 (1891).

Economy Light Co. v. United States, 256 U. S. 113 (1921).

DuPont v. Miller, 310 Ill. 140 (1924).

Streuber v. City of Alton, 319 Ill. 43 (1926).

Godfrey v. City of Alton, 12 Ill. 35 (1850-51).

Gentlemen v. Soule, 32 Ill. 271 (1863).

Kyle v. Town of Logan, 87 Ill. 64 (1877-78).

Grube v. Nichols, 36 Ill. 92 (1864-65).

Kelley v. Chicago, 48 Ill. 389 (1866-68).

Counselman v. Wisconsin Cement Co., 299 Ill. 84 (1922).

Marcy v. Taylor, 19 Ill. 636 (1857-58).

Chicago v. Chicago, Burlington and Quincy Ry., 319 Ill. 351 (1926).

Earl v. Chicago, 136 Ill. 277 (1908).

Rock Island and Peoria Ry. v. Johnson, 204 Ill. 488 (1903).

Pearce v. Wright, 284 Ill. 211 (1918).

Chicago, Rock Island and Pacific R. R. v. City of Joliet, 79 Ill. 25 (1898).

Russell v. City of Lincoln, 200 Ill. 511 (1902-03).

Chicago v. Borden, 190 Ill. 430 (1901).

Village of Augusta v. Tyner, 197 Ill. 242 (1902).

Nelson v. Randolph, 229 Ill. 531 (1906).

Dewey v. Chicago, 274 Ill. 268 (1916).

Braxton v. Bressler, 64 Ill. 488 (1871-72).

Chicago v. Ward, 169 Ill. 392 (1897).

City of Jacksonville v. Jacksonville Ry., 67 Ill. 540 (1873).

People v. Chicago, 321 Ill. 466 (1926).

Canal Trustees v. Haven, 11 Ill. 554 (1849-50).

Chicago and Pacific R. R. v. Stein, 75 Ill. 41 (1874).

Brewster v. Cahill, 199 Ill. 309 (1902).

People v. Board of Supervisors, 125 Ill. 9 (1888).

Sheaff v. People, 87 Ill. 189 (1877-78).

United States v. Illinois Central R. R., 154 U. S. 225 (1894).

Other reference: Elliott, Roads and Streets, pp. 1, 520, 658, 662, 671.

Abandonment and Filling in of Illinois-Michigan Canal: Several opinions have been rendered on the power to abandon and fill in the Illinois-Michigan Canal; namely, Opinion No. 7570 dated May 10, 1932 to the Law Department, Sanitary District, and Opinions No. 7502, 7739, 7901 and 7920, dated March 18, 1932, September 3, 1932, January 13, 1933, and January 28, 1933, respectively, to the Commissioner of Public Works. These opinions have all been invalidated in a subsequent decision of the Cook County Circuit Court in the case of *People ex rel. Otto Kerner v. Chicago*, in which a permanent injunction was issued against the filling in of the canal.—Circuit Court of Cook County, No. B-282869 (1934).

EXTRA LABOR AND MATERIAL UNDER THE RIVER STRAIGHTENING ORDINANCE

(No. 6650—*Commissioner of Public Works—C. J. A.—April 23, 1930—*
5½ pp.)

The river straightening ordinance, and the contract let in pursuance of it give the Commissioner of Public Works full discretion to order extra labor and material, if, in his opinion, the extra labor and material are reasonably necessary to a proper execution of the work and the completion of the contract.

Citation:

Ordinance: Coun. J. (1926-27), p. 4079 (Ordinance providing for straightening of the south branch of the Chicago river).

ADDITIONAL ANCHORAGES UNDER THE RIVER STRAIGHTENING ORDINANCE

(No. 6664—*Commissioner of Public Works—C. J. A.—May 9, 1930—*
2½ pp.)

The specifications of the contract for straightening the south branch of the Chicago river give the Commissioner of Public Works authority to order the construction of additional anchorages for the dock walls of the new channel, if the commissioner judges them to be necessary; the cost of construction is to be paid at the respective rates fixed in the contract.

Citation:

Other reference: Opinion No. 6650 (this page).

EXTRA COMPENSATION TO RAILROAD COMPANY UNDER RIVER STRAIGHTENING ORDINANCE*

(No. 6553—*Commissioner of Public Works—L. H.—December 2, 1929—*
4 pp.)

Extra compensation to the Rock Island Railroad Company for work in connection with the straightening of the Chicago river is not called

*See also opinions, p. 610, on the obligations of railroads under the lake-front ordinance.

for in the ordinance but as that extra compensation is necessary for a speedy execution of the project, it can legally be paid out of the general funds provided for the completion of the project.

Citation:

Ordinance: River Straightening ord., July 8, 1926.

CONDEMNATION OF LAND FOR THE CALUMET RIVER-SAG CHANNEL

(No. 8580—*Commissioner of Public Works—J. J. S.—December 6, 1934—9 pp.*)

Where the federal government has appropriated money for the construction of the Calumet River-Sag channel, the land necessary should be acquired through condemnation by the federal government rather than by proceedings under the Illinois Local Improvement or Eminent Domain acts. The assessments under the Local Improvement act might be thrown out on the grounds that the channel is not a local improvement, while the Eminent Domain method is cumbersome.

Citations:

Statutes: SH '31, 24: 621a.

USCA (1928 ed.), Title 33, secs. 591, 592, 594.

39 US Stat. 409, ch. 260 (Rivers and Harbors act, July 27, 1916).

U. S. Act of June 16, 1933, sec. 202(b), (Public Works Administrator).

Cases: Chicago v. Law, 144 Ill. 569 (1891-92-93).

Condemnation of Rouge River, 266 Fed. 105 (1920).

United States v. Stubbs, 35 F. (2d) 357 (1929).

CONSTRUCTION OF LAKE CALUMET HARBOR*

(No. 6463—*Alderman, 10th Ward—J. G. D.—July 8, 1929—1½ pp.*)

No contract exists between the Nickel Plate Railroad and the city for the construction of Lake Calumet Harbor.

The city may negotiate with other interested parties for Lake Calumet Harbor.

The approval of the state is necessary in order to establish a valid contract between the city and the Nickel Plate Railroad Company for the construction of the Lake Calumet Harbor.

*See Opinion No. 8971, p. 708, "Tax Levy for Lake Calumet Harbor Facilities."

LEGAL STATUS OF NICKEL PLATE CONTRACT—CITY'S RIGHT IN BED OF LAKE CALUMET

(No. 7017—*Commissioner of Public Works—J. G. S.—July 18, 1931—*
30½ pp.)

Section 3 of the ordinance of June 3, 1925, known as the "Nickel Plate Contract," is not a valid contract as it was never approved by the Illinois Department of Purchase and Construction, nor can such required approval be now given since the act under which the contract was authorized has been repealed.

Under the act of 1913, the city has title to both the land and water areas as contemplated in the plan for harbor development in Lake Calumet but subject to the trust imposed upon the state and the city as agent of the state, to keep open and unfilled sufficient areas to meet all future requirements of commerce and navigation.

The repeal of the act of 1921 by the act of 1927 in nowise affected the validity of the grant of Lake Calumet lands to the city under the act of 1921 since the city accepted the grant by its harbor construction plan and said plan was accepted by the state before repeal of the 1921 act.

By grants under acts of 1921 and 1929, when the city, by ordinance shall accept the same, it will acquire title only to the submerged lands to be filled in and reclaimed in Lake Calumet subject to changes in the harbor plan, and the title to the water-area under the harbor plan remains in the state.

The city has power to convey the southern portion of the Lake Calumet bed to the United States government for a terminal transfer harbor since it would be used by the United States government for harbor purposes, but such conveyance would require the written and sealed approval of the Illinois Department of Purchases and Construction.

The city may exercise title rights to the bed of Lake Calumet and it is authorized to construct a deep-water harbor, after the plan is approved by the Department of Purchases and Construction; it may also sell or lease the lands granted, subject to the approval of this same department; provided that all moneys received are to be used exclusively for harbor purposes.

Citations:

- Ordinances: Coun. J. (1925), pp. 467-481 (Nickel Plate Railroad Co. contract ord.), as amended, Coun. J. (1925), p. 875.
Coun. J. (1925), pp. 936-42 (Lake Calumet Harbor plan).
Coun. J. (1921), p. 941, sec. 17.
- Statutes: Ill. Laws (1921), p. 184.
Id. (1925), pp. 585-600.

- Cases:** Id. (1927), p. 243.
Id. (1929), p. 217.
Cah. '29, 19: 59-90.
People v. Kirk, 162 Ill. 138 (1896).
Dupont v. Miller, 310 Ill. 140 (1924).
Cummings v. Chicago, 188 U. S. 410 (1903).
Illinois Central Railroad Co. v. Illinois, 146 U. S. 387, 450 (1892).

BUILDING TO EDGE OF CHICAGO RIVER

(No. 7398—*Commissioner of Public Works—C. J. A.—December 23, 1931—4½ pp.*)

So far as the city is concerned, there is nothing to prohibit the owner to build to the Chicago river's edge on the Kirk property.

Citations:

- Ordinance: Hoover, Spec. ord. (1915), p. 33.
Case: Bates v. Illinois Central Railroad, 66 U. S. 204 (1861).
Other reference: Opinion No. 7292 (this volume, p. 368).

FILLING IN OF DUPONT SLIP AND CANAL E

(No. 7478—*Chairman, Committee on Harbors, Wharves and Bridges—J. G. S.—March 4, 1932—11 pp.*)

The DuPont slip and Canal E being public waters, the rights of the public in them should be preserved against any encroachment or destruction that might be caused by the filling in of these slips.

Citations:

- Statutes: SH '31, 24: 65.33, 65.38, 65.39.
Rivers and Lakes Commission act (1911, and amendments of 1913 and 1919), secs. 5, 18.
Ordinances: Code '31: 2827, 2829, 2873.
Cases: DuPont v. Miller, 310 Ill. 140 (1924).
Chicago v. Chicago, Burlington and Quincy Railroad, 319 Ill. 351 (1926).
Other reference: 18 CJ 38.

SECTION IV

MANAGEMENT OF THE MUNICIPAL CORPORATION

CHAPTER XI

FINANCE

INTRODUCTORY

In 1835 Chicago borrowed \$2,000 to improve the sanitary conditions of the town. To the town treasurer this was "reckless extravagance," and he resigned his office rather than sanction it. Since that time the obligations and duties of the city government have grown and its fiscal operations have expanded to a corresponding degree. At present health regulation alone incurs an annual expense of over two million dollars.

In early years, the finances of the city operated on a small scale but today, an entire financial department is devoted to the orderly fiscal administration of the city. Within the Finance Department are found three major city offices—the Comptroller, who is the head of the department, the City Collector and the City Treasurer. It is their job to attend to the collection, safekeeping, expenditure and book-keeping of municipal funds.

The city now has a single comprehensive financial program laid out at the beginning of the year in an appropriation ordinance. As expenditures are made, they must be approved by the head of the Finance Department, the Comptroller, and payments must be made through his office. Thus, there is not only an audit of all expenditures at the end of the year, but also a day-to-day check of individual expenditures to determine whether they have been authorized by ordinance.

In addition, Chicago manages its finances within certain restrictions imposed by the Illinois Constitution and statutes. The city is limited in its powers to levy taxes, make appropriations and incur debts in various ways. It can not incur debts in excess of 5 per cent of the assessed property valuation of the city. The tax levy, too, is subject to a statutory maximum. Expenditures can be made only for corporate purposes. No money may be devoted to activities which have not received the authorization of the state legislature. These are but a few of the major restrictions.

Recent years have brought novel problems in municipal finance. Depreciation of property values, delinquency in tax payments, extensive use of tax anticipation warrants and increasing demand for governmental services placed a severe strain upon the fiscal administration of the city. This chapter discloses these recent problems as well as the more commonplace fiscal operations involved in matters of taxation, appropriation, expenditures, debts, and claims for and against the city.

A. TAXATION

(1) Assessment and Levy of Taxes

ASSESSING OMITTED PROPERTIES—VALUATIONS FOR ASSESSMENTS

(No. 8557—Alderman—W. L. S.—November 9, 1934—11½ pp.)

If a property owner has not been assessed at all on a particular property, the assessing authorities may in subsequent years assess that property, but if the property has been assessed and the taxes extended on it have been paid, the assessing authorities in subsequent years may not increase that assessment.

When a personal property assessment made by the Board of Assessors for a certain year has been cancelled by the Board of Review, the assessing authorities cannot later assess that property as omitted property.

Valuations for rate purposes reported to a utilities commission are not controlling in determining the appraisal and valuation of the identical property for taxation purposes. Conversely, valuations made by assessing authorities for taxation purposes are not controlling for rate making purposes.

So long as property is valued by the assessing authorities for taxation purposes according to equitable rules which apply to all alike, the action of assessing authorities, in the absence of fraud, will not be reviewed by the courts.

Citations:

Administrative orders: Public Utilities Commission, *Opinions and Orders*, Vol. 8, p. 97.

Cases: *People v. Hunt*, 311 Ill. 291 (1924).
Warner v. Campbell 238 Ill. 630 (1909).
People v. Concordia Fire Insurance Co., 350 Ill. 365 (1933).
Barkley v. Dale, 213 Ill. 614 (1904-05).
People v. Nixon, 353 Ill. 556 (1933).
Northwest Light and Power Co. v. Alexander, 160 Pac. 1103 (1916).
Brooklyn Union Gas Co. v. Pendergast, 7 F. (2nd) 628 (1925).
Missouri Rate Cases, 230 U.S. 353 (1912).
Hulbert v. People, 169 Ill. 115 (1897).
Bistor v. McDonough, 348 Ill. 624 (1932).
Wilcox v. Consolidated Gas Co., 212 U.S. 19 (1908).
Other references: *Whitten and Wilcox, Valuation of Public Service Corporations*, p. 62.

OPINION OF FOREGOING SYNOPSIS

We are advised that, at a meeting of a subcommittee of the committee on local transportation held some time ago, you were directed to request this department to take appropriate action to collect from the Chicago Motor Coach Company, such amount of taxes as it should have paid on its property to the county during the years of its operation.

A discussion arose at your meeting between the members of your subcommittee and the representatives of the Chicago Motor Coach Company relative to the discrepancy between the valuation of the property of the motor coach company for tax purposes and its valuation for rate purposes. The discussion arose, we assume, because of a resolution that had theretofore been referred by the City Council to the committee on local transportation which contained among other things certain figures purporting to reflect such discrepancy.

We have made an investigation of the assessed valuation of the real and personal property of the Chicago Motor Coach Company as well as the taxes extended thereon as shown by the books of the County Treasurer for 1932, the latest year available. * * *

Such property, both real and personal, was appraised and equalized for assessment purposes for 1932, so far as we are advised, according to definite rules adopted by the assessing authorities in order to comply with the constitutional mandate as to uniformity of taxation.

We have also investigated the real and personal property assessments covering the various premises of the motor coach company for several years previous to 1932. In no year, so far as our investigation discloses, was its real estate or personal property altogether omitted from assessment. There were a couple of instances some years ago covering a particular address of one of the company's buildings in which the personal property had been assessed by the board of assessors and such assessments were later cancelled by the board of review. There were also even many instances in which the personal property assessments of the company at various addresses were reduced in different years by order of the Circuit Court of Cook County from what they were as assessed by the assessing authorities.

No particular properties of the motor coach company are called to our attention as having been altogether omitted from assessment in former years, and, we take it, your subcommittee may be under the impression that, if certain properties of the company were under-assessed in the past, the assessing authorities now have power to rectify the matter by increasing such former under-assessments.

There is no doubt under the law if a property owner has not been assessed on particular property at all, the assessing authorities may in subsequent years assess such particular property owned by him but which was omitted, but if the property has been assessed by the assessor and the taxes extended thereon have been paid, the assessing authorities in subsequent years have no authority whatsoever to increase such assessment either on the theory that it was too low or that they there assessed omitted property. The assessor is required, in determining the value of property assessed, to exercise his judgment and his acts are in the nature of judicial acts and not subject to review by his successor or succeeding boards of review for errors of judgment. Furthermore when a personal property assessment made as to particular property by the board of assessors for a certain year has been subsequently cancelled by the board of review, there is no power in assessing authorities to later assess such property as omitted property inasmuch as a former board of review had determined it should not be assessed. *People v. Concordia Fire Ins. Co.*, 350 Ill. 365; *People v. Hunt*, 311 Ill. 291; *Warner v. Campbell*, 238 Ill. 630; *Barkley v. Dale*, 213 Ill. 614.

Where personal property assessments of the motor coach company were

in the past reduced by order of the Circuit Court of Cook County the assessing officers would have, of course, absolutely no right as a matter of law to now increase any such assessments that were so reduced by that court for those years.

The City of Chicago has power under the Revenue act to appear before the assessing authorities and take all necessary steps to enforce the assessment of property altogether omitted from assessment. However, the Supreme Court held in *People v. Nixon*, 353 Ill. 556, that since the amendment by the General Assembly of the Revenue Act of 1932 the board of (tax) appeals in revising the assessment of any property because it is under-assessed may not act only upon the complaint of a taxpayer, the court saying:

"It is clear that in revising the assessment of any property because it is over-assessed, under-assessed or exempt, the board of appeals may act only upon the complaint of a taxpayer."

It may also be that your subcommittee feels that figures contained in reports of the motor coach company to the Illinois Commerce Commission as to the value of the company's property for rate making purposes may be used as the value of the company's property for the purpose of taxation.

However, an exhaustive examination of the subject convinces us that valuations for rate purposes reported to a utilities commission are not controlling in determining the appraisal and valuation of the identical property for taxation purposes and conversely that valuations made by assessing authorities for taxation purposes are not controlling for rate making purposes.

The value of the property of a public utility company in its report to the Illinois Commerce Commission is set forth in accordance with certain accounting practices approved pursuant to the provisions of the Illinois Utilities Law by the Illinois Commerce Commission while the value of the property for tax purposes is appraised and equalized in a different manner altogether in accordance with rules laid down by the assessing authorities pursuant to the Illinois Revenue Law.

Some years ago in the case of the petition of the Chicago Surface Lines to the State Public Utilities Commission for an increase of rates, the City of Chicago presented evidence as to the value placed upon the property of the surface lines by the assessing authorities for purposes of taxation. This was done by the city in the endeavor to keep down the rate of fare as manifestly the value of the company's property for taxation purpose would be much lower than the valuation presented to the commission for rate making purposes. Federal Judge James H. Wilkerson was then chairman of the State Public Utilities Commission and in the opinion written by him in that case (Vol. VIII, Opinions and Orders, Public Utilities Commission of the State of Illinois, page 97) it was stated that it was impossible under the existing law to reconcile valuations made for rate making purposes and valuations made for tax purposes because of the different bases on which they were made and that the valuations made by the assessing officers for tax purposes cannot be substituted for valuations made in accordance with the method prescribed by the Supreme Court for valuing properties of public utilities for rate making purposes.

* * * * *

ASSESSMENTS—REAL AND PERSONAL PROPERTY

(No. 7063—City Comptroller—L. H.—August 8, 1931—3½ pp.)

Both real and personal property must be assessed alike under the Constitution and by the same appraisal percentages of actual value.

HORIZONTAL REDUCTION OF ASSESSMENTS*

(No. 7988—County Assessor—L. H.—April 1, 1933—6½ pp.)

The Board of Appeals can make a horizontal reduction of assessments in large classes of property only when it is revising in the first instance but not when a taxpayer asks for a correction after the tax has been put into collection.

Citations:

- Statutes:** Revenue act (1898), sec. 35.
Board of Appeals act (1932), sec. 34.

County Assessor: The office of County Assessor is created in counties of 250,000 or more inhabitants who is to be successor to the Board of Assessors.—Ill. Laws (1st sp. sess. 1931-32), p. 66.

NEW PROCEDURE FOR KEEPING ASSESSMENT ROLLS

(No. 6563—Chairman, Finance Committee—L. H.—December 11, 1929—2 pp.)

The copying of certified assessment rolls into the books of the City Collector may be discontinued and a new procedure introduced so long as it does not hinder the making of the return of unpaid and delinquent special assessments to the County Collector.

Citation:

- Statute:** Local Improvement act, sec. 64.

ASSESSMENT OF TUNNELS UNDER CITY STREETS

(No. 7939—County Assessor—W. L. S.—February 10, 1933—12½ pp.)

A private tunnel company may be assessed on tunnels under the streets of Chicago even though the ownership of the tunnels is in the city; such assessment should be based on the value of the company's rights and privileges in the land which rights may be deemed to be real property.

Citations:

- Statutes:** Cah. '31, 120: 65 (Revenue act).
Hurd '03, 120: 292.
- Ordinances:** Coun. J. (1932-33), p. 2731 (Chicago Tunnel Co. ord.).
Id. (1898-99), p. 1692 (Illinois Telephone and Telegraph Co. conduit ord.).
Id. (1903-04), p. 914 (Illinois Telegraph and Telephone Co. tunnel ord.).
- Case:** People v. Upham, 221 Ill. 555 (1906).

Tax Exemption, Lease by City: Property occupied by the city for hos-

*See Opinion No. 6848, p. 750, on the valuation of property for taxing purposes at less than full value.

pital purposes under a ninety-nine year lease is not exempt from taxation as city property, since a lease is not the equivalent of ownership for purposes of taxation.— *People v. Chicago*, 335 Ill. 450.

RATE OF TAX LEVY

(No. 6641—County Clerk—L. H.—April 17, 1930—2 pp.)

The rate of taxation to be applied in any year is the rate which was authorized at the time the levy was made, even though the extension and collection of the taxes has been delayed.

Citation:

Case: *People v. Pittsburgh, Cincinnati, Chicago, and St. Louis Ry.*, 316 Ill. 410 (1925).

TAX LEVY ON ONE CLASS OF PROPERTY

(No. 8559—J. F. G.—November 15, 1934—1 p.)

A tax may not be levied on any class of property, such as foreclosed buildings, without a similar levy upon all other classes of property.

Tax Levy to Cover Delinquency as Loss in Collection: A reasonable amount for loss and cost of collection of taxes may be added to the taxes extended for the city but delinquent personal property taxes cannot be considered under the head of "loss" unless the legal means of collection have failed.—*People v. Northwestern Mutual Life Insurance Co.*, 361 Ill. 248 (1935).

POWER TO IMPOSE LUXURY TAXES

(No. 7076—Mayor—L. H.—August 18, 1931—4½ pp.)

The city has no power to impose a tax on luxuries in any form, either as a license tax or an excise tax, but the state may impose such taxes and probably could delegate this power to the city.

Opinion No. 7450 of February 17, 1932, to the City Council discusses the same point as the above opinion.

"HEAD TAX" ON COMMUTERS

(No. 7297—Alderman, 39th Ward—L. H.—November 14, 1931—1½ pp.)

The City Council has no power to enact an ordinance which requires all persons living beyond the city limits who commute daily to the city for their employment to pay an annual "head tax," and even if it had, such an ordinance would probably be unconstitutional.

SALES TAX OR INSPECTION FEE ON BEDDING

(No. 7586—*President, Board of Health—L. H.—May 25, 1932—2 pp.*)

The city could not legally levy a tax on each mattress, comforter, or pillow sold in Chicago for the purpose of maintaining an inspection service over bedding material.

The city has no authority to levy a sales tax on bedding, nor would the police powers allow it to charge a fee for inspecting bedding in private homes.

TAX ON CAPITAL STOCK

(No. 7213—*City Council—L. H.—October 26, 1931—3 pp.*)

The City of Chicago has no power to tax on the value of shares of capital stock, nor could the legislature grant it power to levy such a tax as it is a property tax and subject to the uniformity clause of the Illinois Constitution requiring property taxes to fall uniformly on the property of all persons and all kinds of property.

Citations:

Constitution: Illinois, art. IV, sec. 31; art. IX, sec. 9.

Cases: *Robbins v. Kodyk*, 312 Ill. 290 (1924).

Marshall v. Upper Cache Drainage District, 313 Ill. 11 (1925).

Tax for City Band: Referendum on tax levy for maintenance of a municipal band for musical purposes authorized.—Ill. Laws (1935).

CHANGE OF TAX LEVY—CONTESTING TAX REDUCTION

(No. 6498—*City Comptroller—L. H.—August 28, 1929—3 pp.*)

The County Clerk is not required to take notice of any change in the tax levy except on the passage of a proper ordinance by the City Council and its certification to the County Clerk.

A person who is not injured by a reduction in his taxes has no right to contest such taxes, even though there was some irregularity in the manner of extending them.

Tax Levy, Surplus on Hand: The City Council is not required to accept at face value the amount of uncollected taxes for previous years as shown in the Comptroller's annual report in estimating the surplus on hand available for appropriation. Where the tax objector has not shown the availability of uncollected taxes for years 1901-1927, the tax levy for 1931, which omitted this item in the determination of the available surplus, is valid.—*People v. Maxwell and Co.*, 359 Ill. 570 (1935).

TAX LEVY FOR THE FIREMEN'S ANNUITY AND BENEFIT FUND

(No. 6997—Committee on Finance—G. F. M.—July 9, 1931—5½ pp.)

Under the provisions of the Firemen's Annuity and Benefit Fund act of 1931, it is mandatory upon the city to levy a tax as a contribution to the fund established by the act.

Citations:

Statute: Firemen's Annuity and Benefit Fund act, sec. 1, 15-52, 63.

Cases: People v. Abbott, 274 Ill. 380 (1916).

Home Insurance Co. v. Swigert, 104 Ill. 653 (1882).

Aurora Brewing Co. v. Industrial Board of Illinois, 277 Ill. 142 (1917).

People v. Chicago, Burlington, and Quincy R. R., 290 Ill. 327 (1920).

Schuyler County v. Mercer County, 9 Ill. 20 (1847).

Binder v. Langhorst, 234 Ill. 583 (1908).

Prokaw v. Highway Commissioners, 130 Ill. 482 (1889-90).

Tax Levy Limitations, Annuity and Benefit Funds: Taxes levied for the Policemen's Annuity and Benefit Fund and the Municipal Employees' Annuity and Benefit Fund have been held to be "taxes for purposes of pension fund" within the meaning of the statute exempting taxes for such purpose from the limitation on the total tax levy.—People v. New York Central R. R. Co., 356 Ill. 67 (1934).

STREET AND BRIDGE TAX

(No. 7425—City Comptroller—L. H.—January 19, 1932—2½ pp.)

It would seem that the "Street and Bridge Tax" act permits the tax authorized by it to be levied for the purpose of paying public benefits on special assessment projects, but there is much doubt in the matter.

A tax under the "Street and Bridge Tax" act may be extended outside of, and in addition to, the regular corporate rate.

Citation:

Statute: SH '31, 24: 696 (Juul Law).

TAX LEVY FOR LAKE CALUMET HARBOR FACILITIES*

(No. 8791—Alderman, 9th Ward—J. F. G.—June 8, 1935—2 pp.)

The city may levy a tax for the construction of harbor facilities in Lake Calumet. The tax must be within the maximum rate allowed by law for all other corporate purposes and not in addition to those purposes; it would not be subject to reduction under the Juul law, although it must be included in the aggregate city tax rate which is subject to scaling under the Juul law; and it could not be used for purposes other than the construction of the harbor facilities.

Citations:

Statute: SH '33, 24: 600(b).

Other reference: 17 Op. Corp. Counsel 136.

*See also Opinion No. 6463, p. 695, "Construction of Lake Calumet Harbor."

TAXING FOREIGN FIRE INSURANCE COMPANIES

(No. 7441—*Mayor—L. H.—February 8, 1932—3 pp.*)

The city is limited in its power to tax foreign fire insurance companies doing business in the city to a tax of two per cent on the gross receipts of agencies in the city.

Citations:

Ordinances: Code '31: 3438-40.

Opinion No. 6522 of October 8, 1929, to the City Comptroller discusses the same point as the above opinion.

INCOME REPORT OF FOREIGN FIRE INSURANCE COMPANIES

(No. 8465—*M. M. F.—July 11, 1934—3½ pp.*)

Each foreign fire insurance company engaged in business in the city is required to make a yearly verified report of all premiums received in the city and to pay the city two per cent per annum of the gross receipts received for premiums; failure to discharge this duty is made punishable by fine or imprisonment.

Citations:

Statute: SH '33, 24: 669.

Ordinances: Code '31: 3439-41, 3443.

Cases: Union Central Life Insurance Co. v. Lowe, 349 Ill. 464 (1932).
People v. Skanda Insurance Co., 329 Ill. 166 (1928).
People v. Commercial Union Fire Insurance Co., 322 Ill. 326 (1927).

TAX OF FIRE INSURANCE

(No. 6626—*City Comptroller—L. H.—March 24, 1930—2 pp.*)

If an aviation insurance company insures against fire, it must make a tax return to the city and pay the Fire Department tax, provided that the premiums for the fire part of the risk can be separately defined or specified.

Citations:

Ordinance: Code '22, p. 474.

Case: People v. Commercial Union Fire Insurance Co., 322 Ill. 326 (1927).

NET RECEIPT RETURNS OF FOREIGN FIRE AND MARINE INSURANCE

(No. 7889—Board of Appeals—L. H.—January 7, 1933—2½ pp.)

Returns of net receipts filed by the foreign fire, marine and inland navigation insurance companies should be made on form 16 prepared by and prescribed by the State Tax Commission.

Citation:

Case: *People v. Concordia Fire Insurance Co.*, 350 Ill. 365 (1933).

RETURNS OF NET RECEIPTS BY INSURANCE COMPANIES FOR TAXES

(No. 7902—County Assessor—L. H.—January 16, 1933—1½ pp.)

Tax returns of net receipts from insurance companies may be made on form 16 as prescribed by the Tax Commission by using the totals of gross receipts shown in original returns and in the recent returns; 70 per cent of the gross premium in the original returns amount to the same as the net receipts figured on the basis of new returns, but 74 per cent should be taken on the gross premiums added in recent returns.

Citation:

Case: *People v. Concordia Fire Insurance Co.*, 350 Ill. 365 (1933).

1930 ASSESSMENT OF FOREIGN INSURANCE COMPANIES' RECEIPTS

(No. 7153—Board of Review, County Building—W. L. S.—September 29, 1931—2 pp.)

The assessment of the net receipts of foreign insurance companies subject to section 30 as made by the Board of Assessors for the year 1930 is wholly illegal and should be held to be void by the Board of Review.

Citation:

Case: *People v. Franklin National Insurance Co.*, 343 Ill. 336 (1931).

DEDUCTIONS FOR TAX ON FOREIGN INSURANCE COMPANIES

(No. 7202—Board of Review of Cook County—L. H.—October 21, 1931—1½ pp.)

For purposes of the tax on net receipts of foreign insurance companies, the only deductions to be allowed from the gross premiums of such companies are the total returned premiums and local operating expenses.

Citation:

Case: *People v. Barrett*, 309 Ill. 53 (1924).

(2) Collection and Payment of Taxes

EXPENSES FOR TAX COLLECTION—TAX COLLECTION BY CITY

(No. 6668—L. H.—May 12, 1930—2½ pp.)

Public money may be paid out in the collection of taxes only for services rendered in the collection and cannot be paid out merely for information about taxes illegally withheld.

The duty of collecting taxes is a function of the county government and the city can only participate in order to assist the county in collecting the city's taxes.

SEMI-ANNUAL TAX COLLECTION

(No. 7055—City Comptroller—L. H.—August 3, 1931—1½ pp.)

An amendment to existing tax collection statutes will be necessary to save the city the added costs involved in the semi-annual collection of taxes.

CREDIT OF CITY'S DEBTS AGAINST TAXES—REDEMPTION OF PROPERTY AFTER TAX SALE

(No. 7693—L. H.—August 4, 1932—4 pp.)

Taxes of the state, county and all local governments are all added together and collected as one item from the taxpayer and the indebtedness of the city cannot be set off against this tax and the process of collection cannot be stayed merely because the city owes the taxpayer his salary.

A taxpayer may redeem his property sold at tax sale any time within 2 years from the date of the sale by paying the delinquent tax and costs within that period and may even recover his property after the statutory period of redemption has expired by making an equitable showing in court that he was unjustly deprived of his property.

TAX WARRANTS FOR TAX PAYMENTS

(No. 7407—*Chief Clerk, Board of Review of Cook County*—L. H.—*January 7, 1932*—2 pp.)

General corporate tax warrants must be accepted in payment of taxes extended for general corporate purposes.

Citation:

Statute: SH '31, ch. 146½ (Warrants act).

Opinion No. 6900 of May 13, 1931, to the City Comptroller discusses the same point as the above opinion.

REFUND OF TAX PAYMENTS*

(No. 6673—*Chairman, Finance Committee*—H. M. S.—*May 15, 1930*—1½ pp.)

When a tax has been levied under a valid ordinance which has neither been attacked nor repealed, and when the rate has been designated as a just one, no return can be made of money collected for the tax.

Citation:

Ordinance: Code '22: 176.

REFUND OF TAXES VOLUNTARILY PAID*

(No. 6541—*Chairman, Committee on Finance*—J. L.—*November 15, 1929*—2 pp.)

If a taxpayer voluntarily pays taxes, he cannot recover them, even if he afterwards discovers an invalidating defect in the assessment.

Citations:

Case: *Dunnell Manufacturing Co. v. Newell*, 15 R. I. 233, 237 (1886).

Other references: *McQuillin*, *Mun. Corp.* (2nd ed.), sec. 2671.

Dillon, *Mun. Corp.*, (5th ed.), sec. 1621.

RECOVERY OF TAXES PAID IN ERROR*

(No. 6786—*City Comptroller*—F. J. C.—*October 6, 1930*—9 pp.)

A taxpayer cannot secure a refund of taxes which have been credited to the property of another, even though his own property has subsequently been sold for the non-payment of taxes.

To maintain an action for the recovery of the payment of taxes, it

*See also opinions, pp. 464-468, on the refund and recovery of fees.

must be shown that the payment was made under compulsion and duress.

Citations:

Statute: Cah. '29, 120: 213, 229, 267, 282-283.

Cases: Heydecker v. Price, 136 Ill. App. 512 (1908).

School of Domestic Arts v. Harding, 331 Ill. 330 (1928).

Hettler Lumber Co. v. Cook County, 336 Ill. 645 (1930).

PAYMENT OF TAXES ON RECEIVERSHIP PROPERTY

(No. 7783—City Comptroller—L. H.—October 19, 1932—3 pp.)

The court that appoints a receiver has the duty of requiring the receiver to pay the taxes on the property in receivership in order to conserve the estate. Ordinarily, the payment of taxes is entitled to priority over everything else except court costs and expenses of the proceedings.

Citations:

Statute: SH '31, 120: 238.

Other references: 53 CJ 243, 244.

Tax Collection, Receivership: After taxes upon real property have been delinquent for six months, the county collector may apply to any court of competent jurisdiction to be appointed receiver of such property for the purpose of collecting rents and income thereof for the satisfaction of said taxes, penalties, interest and cost.—Ill. Laws (1933), p. 873; repealed, Ill. Laws (1935), p. 1166, sec. 2.

The tax lien upon real property may be enforced at any time after the taxes have been delinquent for six months out of the rents and profit of the land under the control of a court by petition of the county board or taxing body entitled to such delinquent tax in any pending suit involving the land or in any application for order of sale for delinquent taxes. In all such petitions the court shall have power to appoint the county collector as receiver to take possession of the real estate to collect the rents thereof and apply same in satisfaction of the tax lien.—Ill. Laws (1935), p. 1166, sec. 1.

The act authorizing the appointment of the county collector as receiver with power to collect rents or property upon which taxes have remained unpaid for more than six months confers jurisdiction of such proceeding on circuit courts and those of like jurisdiction but not on county courts.—McDonough v. Gage, 357 Ill. 466 (1934).

An order of a county court appointing the county collector as receiver may be expunged by writ of mandamus when the county court had no jurisdiction over the proceeding.—People v. Jarecki, 357 Ill. 475 (1934).

PAYMENT OF TAXES ON PROPERTY IN FORECLOSURE*

(No. 7851—Judge of Superior Court—L. H.—December 22, 1932—2 pp.)

A court in which foreclosure proceedings are pending has power to

*See also Opinion No. 7171, p. 717.

order a trustee operating an income bearing property to pay the general real estate tax levied against the trust estate.

Citation:

Reference: 26 Ruling Case Law, sec. 181.

FILING TAX CLAIMS IN BANKRUPTCY*

(No. 8753—*City Collector—O. S. F.—April 24, 1935—1½ pp.*)

A referee in bankruptcy may order a state or city to file claims for taxes within a certain time, and if it fails to do so, those claims are barred.

Citation:

Case: *New York v. Irving Trust Co.*, 288 U. S. 329 (1933).

Delinquent Personal Property Tax: A delinquent personal property tax, as distinguished from a delinquent real estate tax, is a direct personal liability.—*People v. Northwestern Mutual Life Insurance Co.*, 361 Ill. 248, 257 (1935).

PAYMENT OF PENALTY FOR DELINQUENT TAXES

(No. 7470—*City Comptroller—L. H.—March 1, 1932—3½ pp.*)

The payment of the penalty due on taxes must be made in all cases where payment is not made before the delinquency date. The sum tendered, in order to be accepted, must cover the amount due originally and the penalty on that sum which has since accrued.

ELIMINATING PENALTIES ON DELINQUENT TAXES

(No. 8174—*L. H.—September 12, 1933—2½ pp.*)

Neither the City Council nor the state legislature may constitutionally cancel accumulated penalties on past delinquent taxes but the state legislature may eliminate penalties on future delinquent taxes.

The state legislature has no power to eliminate penalties on future delinquent taxes for only those who have no ability to pay as this would amount to an unlawful discrimination and would be unconstitutional.

Delinquent Tax Penalties: In counties exceeding 500,000 inhabitants the county court is authorized upon certain conditions to waive all accrued interest and penalties added after forfeiture for delinquent taxes of 1932 and prior years in cases where the tax was levied against homes occupied by their owners.—Ill. Laws (1935), pp. 1190, 1191.

The county collector of a county exceeding 500,000 inhabitants may with the approval of the county court accept delinquent taxes and costs and 50 per cent of accrued interest on delinquent taxes for certain years if an affidavit is filed that failure to pay taxes was not wilful.—Ill. Laws (1935) pp. 1190, 1191.

*See also Opinion No. 8164, p. 767.

INSTALLMENT PAYMENT OF TAXES—PAYMENT OF TAXES BY TAX ANTICIPATION WARRANTS*

(No. 7930—*Chairman, Committee on Finance—L. H.—February 6, 1933—7½ pp.*)

The plan to permit real estate taxpayers to pay their delinquent taxes in installments over a period of years, where some taxpayers have already paid their taxes in full or in part, is probably unconstitutional.

Where taxes have not yet been put into collection, the plan to extend the time of payment is constitutional, if limited to taxes for other than state purposes.

Where installment payments may be authorized, there would have to be a differentiation in the distribution of the cash collections from the installment basis taxes as between the state's portion and the taxes of the local government units.

The County Collector or any other official authority may be granted authority to act in a trust capacity for the purpose of discounting notes of delinquent taxpayers given for their taxes.

Owners of tax anticipation warrants have the right to pay their taxes with these warrants and also the right to the first money obtained on the collection of these taxes.

The city may not constitutionally delay the time for collecting levies for interest and principal on bonds that are to fall due under the terms of the ordinances authorizing the bond.

Citations:

Constitution: Illinois, art. IX, secs. 4-6.

Case: Gates v. Sweitzer, 347 Ill. 353 (1932).

Tax Payments in Installments: The county collector in counties containing 500,000 or more inhabitants may enter into agreements with delinquent taxpayers to pay taxes plus interest for 1932 and prior years in seven annual installments on property forfeited for delinquent taxes.—Ill. Laws (1935) p. 1168.

CANCELLATION OF CONDITIONAL PART PAYMENT OF TAXES

(No. 7865—*City Comptroller—C. J. A.—December 28, 1932—1½ pp.*)

When part payment of a tax claim is accepted upon the condition that the balance will be paid within sixty days, the failure of the taxpayer to pay the balance within the time specified gives the City Comp-

*See also Opinion No. 7055, p. 711, "Semi-Annual Tax Collection."

troller the right to cancel the payment received and return the check given.

When the city exercises its right to return a check given in partial payment of a tax claim, it need not file a claim with the receiver of the defunct bank upon which the check was drawn.

Citation:

Reference: Opinion No. 7845 (this page).

CHECK HELD BY CITY FOR CONDITIONAL TAX SETTLEMENT*

(No. 7845—City Comptroller—C. J. A.—December 19, 1932—3½ pp.)

A person who receives a check on a bank must present it for payment without delay, otherwise the drawer will be discharged to the extent of the loss caused by the delay. But where the check is accepted conditionally, it need not be presented until the condition is performed.

The city may cancel a tax settlement and return the check given therefor when it was held conditionally and the conditions have not been complied with and any loss due to the failure of the drawee bank while the check was so held by the city must be borne by the taxpayer.

Citations:

Statute: SH '31, 98: 207 (Negotiable instruments act, sec. 185).

Case: First National Bank of Kewanee v. Wine, 255 Ill. App. 578, 582 (1929-30).

TAX OBJECTIONS

(No 7575—Mayor—L. H.—May 13, 1932—4 pp.)

A receiver, a purchaser at a tax sale, a mortgagee, or a trustee, whichever one has possession of the property at the time, may file objections to taxes in the same way and to the same extent and purpose as the owner.

In making payment of a certain per cent of a tax, it will be necessary for the owner, receiver or other party in interest to specify what part of the tax he is paying, if he desires to avail himself of the full benefit of an objection to be filed in the County Court at a later date.

Citations:

Statute: SH '31, 174: 179.

Cases: People v. Chicago and Eastern Illinois R. R., 315 Ill. 536 (1925).
People v. Schlitz Transfer Co., 333 Ill. 333 (1929).

Tax Objections: The act which requires a person objecting to the taxes on his land to pay 75 per cent thereof under protest is not applicable to objections to special assessments since "special assessments" are not taxes. — People v. Brewer's Estate, 362 Ill. 88 (1935).

*See also Opinion No. 7900, p. 772.

(3) *Tax Sales*

DATE FOR TAX SALE

(No. 6489—City Comptroller—L. H.—August 12, 1929—3 pp.)

The sale for delinquent general taxes should be held before the sale for delinquent special assessments; where there is such a delay as to result in the sale not being held during the year, it should be deferred until the following year.

Citations:

Statutes: Ill. Laws (1929) p. 239 (Local Improvement act, sec. 64); p. 604 (amendment to sec. 178), p. 606; Revenue act, secs. 178, 182, 184, 185, 191, 210.

PRIORITY OF REAL ESTATE TAX LIEN*

(No. 7171—Board of Commissioners—F. J. B.—October 7, 1931—2½ pp.)

The taxes upon real property constitute a first and prior lien upon such real property superior to all other liens and encumbrances, and upon foreclosure of the property the interests of all persons in the property who have been made defendants to the suit are cut off; consequently to make the city a party defendant in suits to foreclose liens for general taxes would jeopardize the city's special assessments.

Citation:

Statute: Revenue act, sec. 253.

TAKING POSSESSION OF PROPERTY UNDER TAX LIEN

(No. 7435—City Comptroller—L. H.—January 30, 1932—2½ pp.)

The city cannot take possession of property against which it holds a tax lien without the possibility of being ousted and sued for damages by the owner.

PRESERVING TAX LIEN ON REAL ESTATE

(No. 8161—City Comptroller—A. A. S.—August 29, 1933—2 pp.)

The requirement of filing with the registrar of titles a tax lien on property within two years of the tax sale on such property applies to

*See also Opinion No. 7851, p. 713, and Opinion No. 7346, p. 718.

all such sales occurring within a year previous to the enactment of this requirement.

A retrospective statute for preserving a lien on the real estate of a debtor is constitutional since it affects only the remedy.

Citations:

Statute: SH '33, 30: 119.

Cases: League v. Texas, 184 U. S. 156 (1901).

Bolton v. Johns, 5 Pa. St. 145 (1847).

People v. Clark, 283 Ill. 221 (1918).

PRESERVATION OF TAX LIEN ON TORRENS AND NON-TORRENS PROPERTY

(No. 7610—City Comptroller—L. H.—June 15, 1932—4 pp.)

It is expressly provided that the recording of certificates of sale or the proof of such certificates in the Office of the Recorder within three years preserves the lien of the city on property that is not registered under the Torrens system, but a lien can be preserved on land registered under the Torrens system only by presenting to the Registrar of Titles within one year the certificates of sale or proof of those certificates.

The city is expressly exempted from paying the three dollar fee for filing a certificate of sale or proof of a certificate of sale with the Registrar of Titles.

Citations:

Statutes: Revenue act, sec. 225.

SH '31, 143: 108.

Land Title act, sec. 82.

FORECLOSURE OF PROPERTY ON WHICH CITY HAS LIEN

(No. 7346—City Comptroller—L. H.—December 7, 1931—1 p.)

An exclusion from foreclosure of property on which a municipality has a lien would probably be unconstitutional.

Citation:

Statute: Revenue act, secs. 224, 225.

FILING OF CERTIFICATES OF TAX SALE

(No. 7626—City Comptroller—L. H.—June 28, 1932—1½ pp.)

There is no way by which the City Comptroller can compel the Registrar of Titles to construe section 225 of the Revenue act so as to allow the city more than one year within which to file certificates of sale and so preserve a lien of the city.

The city should refuse to take the certificates of sale, and should withdraw delinquent property from sale in all cases where it is impossible to get the certificates of sale filed within the limit of one year.

Citation:

Statute: Revenue act, sec. 225.

**TIME EXTENSION FOR FILING TAX CERTIFICATES ON
TORRENS PROPERTY**

(No. 7018—*City Comptroller—L. H.—July 20, 1931—2½ pp.*)

The Act of July 3, 1931, which extended the time of filing tax certificates under the Torrens system from six months to a year is retroactive in effect as it is a procedural matter and thus applies to all cases where the matter has not been finally disposed of.

Citations:

Statutes: Ill. Laws (1931), p. 387.

Case: Mather v. Parkhurst, 302 Ill. 236 (1922).

COSTS OF TAX SALE PURCHASES BY THE CITY

(No. 7491—*City Comptroller—L. H.—March 14, 1932—3½ pp.*)

The County Collector may properly charge the entire cost of the purchases of the city at a real estate tax sale to the warrants for collection in accordance with the amount due from each warrant.

CITY'S PURCHASE OF TAX DELINQUENT PROPERTY

(No. 7321—*City Comptroller—L. H.—November 25, 1931—2½ pp.*)

The discretion of the city's tax agent should be freely exercised when he finds the circumstances warrant a departure from the recommendations given to him.

As a matter of policy, in tax sales, the city's agent may allow to go to forfeiture all property with delinquent assessments, where city's claims do not amount to more than twenty-five dollars, with exception that, for property under the Torrens law, the claims should not amount to more than three dollars.

Also as a matter of policy in tax sales, on default of other bidders and where the city's claims amount to more than three dollars under the Torrens law or more than twenty-five dollars in all other cases, the city should, within proper discretionary limits, purchase the property.

Citation:

Statute: SH '29, 120: 224, 225.

B. APPROPRIATIONS

(1) *Powers and Limitations in Appropriating*

APPROPRIATIONS FROM WATER FUND

(No. 6484—City Comptroller—L. H.—August 5, 1929—4 pp.)

The City Council has no power to make appropriations from the water fund for any other purpose than for the needs of the water system, even though reimbursement would be secured.

Citations:

Ordinances: Coun. J., March 30, 1929, p. 4999.

Id. July 10, 1929, p. 722.

Statute: Cities and Villages act, art. I, sec. 6.

Case: People v. Hummel, 215 Ill. 71 (1905).

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of July 12, 1929, in which you call attention to certain appropriations from the water fund designed to be used for improvements to the municipal power plant located in the yards of the house of correction.

On March 30, 1929 (Council Journal, p. 4999) the City Council appropriated \$164,000.00 for the improvements to the city boiler plant under code designation 193-X-2 from the water fund. On July 10, 1929 (Council Journal, p. 722), the City Council authorized the expenditure of an additional \$160,000.00 to be secured by means of transfer to the said account 193-X-2, and to be used in addition to the \$164,000.00, altogether making a total of \$324,000.00 apparently authorized for this purpose.

You state in your letter that all the work that will be paid for from this appropriation and transfer will be for the benefit of Cook County criminal court building, and Cook County jail, located at the corner of 26th street and California avenue. You say that the present power plant is entirely adequate to take care of all the requirements for water works purposes, and that none of the proposed additional expenditure is necessary for water works operation and maintenance, and therefore, would not be spent for water works purposes, but for the purpose of furnishing light, heat and power for the elevators in county buildings. You ask whether it would be proper and legal to use money from the water fund for this purpose, and you suggest, as an alternative, the possibility of Cook County providing for the necessary money in the power plant so as to install the necessary equipment.

The expenditure of money from the water fund for the purposes mentioned would be contrary to law, and the action of the City Council in thus making provision for payment of such expense from the water fund therefore amounts to a nullity, since you would not be justified in approving the expenditure, or authorizing payment in accordance with the action of the City Council.

The Cities and Villages act was passed in 1872 and was adopted by the City of Chicago in 1874. Prior to its adoption by the City of Chicago, the city operated under a special charter which contained a provision that required the City Treasurer to keep money received from water loan bonds and water rents in a separate fund, and prohibited the use of such monies for any other purpose than for the need of the water system. This pro-

vision was not repeated in the Cities and Villages act, and therefore it was contended by some that it was no longer in force after the adoption of the Cities and Villages act by the city. The City Council appears to have entertained this doubt for a long time, and finally it undertook to test the matter by appropriating certain monies for other purposes, and authorizing the transfer of such monies from the water fund to the general corporate fund. The courts did not sustain this action of the City Council, however, and the matter was finally authoritatively settled by the decision of the Supreme Court in the case of *People ex rel. City of Chicago v. Hummel*, City Treasurer, 215 Ill. 71. In this case the Supreme Court held that although there was no reiteration of the special charter provision in the Cities and Villages act, nevertheless it remained in force by reason of the provision in section 6 of article I of the Cities and Villages act under which all laws, or parts of laws, governing the city's affairs and not inconsistent with the provisions of the Cities and Villages act, should continue in force in the city. The court held that the order directing the transfer of the money from the water fund to the corporate fund was not a valid exercise of power on the part of the City Council, and upheld the treasurer's refusal to obey the command of the warrant issued for the purpose of carrying the ordinance into effect. This decision, and subsequent ones along the same line, are conclusive upon the point you are seeking information.

You suggest that it may be possible for Cook County to provide the necessary money to install this equipment, and you intimate in your letter that perhaps the work could then be done upon the provision for reimbursement being made. Even under such circumstances it would not be proper to draw on the water fund for the purpose of making the improvements. The work would have to be financed otherwise, preferably by the setting up of a capital account, which could be drawn on as needed, and could be reimbursed when the county paid the money required, from it. There is no authority in law for drawing on the water fund for purpose of construction work of this kind, even though reimbursement would be secured.

* * * * *

REIMBURSEMENT OF THE WATER FUND

(No. 6706—*Commissioner of Public Works—C. J. A.—July 7, 1930—2 pp.*)

Funds borrowed from the water bureau by other departments, either directly or indirectly, should be repaid.

The City Council should make appropriations to the several departments out of the corporate fund to reimburse the water fund for funds so withdrawn or expenses incurred on behalf of other departments.

Citations:

Case: *People v. Hummel*, 215 Ill. 71 (1905).

Other reference: Opinion No. 6484 (this volume, p. 720).

USE OF WHEEL TAX FUND FOR STREET SIGNS

(No. 7406—*Mayor—L. H.—January 7, 1932—1½ pp.*)

The City Council may appropriate a portion of the wheel tax fund for the repair and replacement of street signs.

Appropriations for Auto Inspection: Any city over 40,000 may appropriate monies annually from vehicle license revenues for construction and operation of testing stations for the inspection of motor vehicles.—Ill. Laws (1st sp. sess., 1935), p. 63.

Appropriation for Traction Expenses: The city may pay out of the appropriation for the office of Corporation Counsel for legal services rendered by attorneys whom the Corporation Counsel had appointed as assistants to act as counsel for a citizen's traction settlement committee in drafting proposed traction bills introduced before the legislature and procuring the passage of the bills.—*Baltzer v. Chicago*, 260 Ill. App. 384 (1931).

FAILURE TO MAKE AUTHORIZED APPROPRIATIONS

(No. 7620—*L. H.—June 22, 1932—2 pp.*)

The failure of the City Council to make an appropriation for any purpose authorized by law does not render the appropriation ordinance invalid.

The question of what appropriations are to be made is wholly for the City Council, except in so far as an aggrieved party may ask a court to order an omitted appropriation.

CITY COUNCIL CONTROL OVER APPROPRIATIONS*

(No. 7573—*Chairman, Committee on Finance—L. H.—May 13, 1932—2 pp.*)

When an appropriation is made for a specific purpose, there is no need of further action by the City Council, but when an appropriation is intended to apply to a number of items which are grouped under a general heading, especially if the matter calls for the exercise of a choice or discretion for which authority has not been given, further action by the City Council is necessary.

Purpose of Specific Appropriations: The purpose of the statute requiring the specification of the objects and purposes for which appropriations are made is to enable a taxpayer to compel the application of public funds to the purposes for which they were appropriated and to prevent the application of funds to other purposes or the raising or expenditure of more money than is necessary for legitimate corporate purposes.—*Siegel v. City of Belleville*, 349 Ill. 240 (1932).

*See also Opinion No. 7339, p. 738, on the itemization of appropriations.

OBJECTS OF APPROPRIATION

(No. 7451—*Chairman, Committee on Finance—M. F. M.—February 17, 1932—2 pp.*)

The city is not liable for the acts of its employees who are acting under its police powers.

The city has no power to appropriate money for other than corporate purposes and the payment of city debts and expenses.

Citations:

Statute: Cah. '31, 24: 65 (2).

Case: Johnston v. Chicago, 258 Ill. 494 (1913).

APPROPRIATIONS FOR CORPORATE PURPOSES—LIABILITY FOR RADIO BROADCASTS

(No. 7503—*Commissioner of Public Works—L. H.—March 18, 1932—4 pp.*)

The City Council can appropriate only for a corporate purpose, that is, one which is germane to the objects for which the corporation was created and which has a legitimate connection with those objects.

Not every radio broadcast which might be construed as a benefit to the people can be regarded as a corporate purpose.

The city will be bound by the acts of an officer even though the acts under certain conditions were irregular and unauthorized. Generally, however, the city would not be liable for the cost of a radio broadcast, unless the City Council duly authorized the making of the contract under which the charge was incurred, and the properly authorized officer formally entered into the contract in the manner prescribed by the City Council.

Citation:

Case: Elsenau v. Chicago, 334 Ill. 78 (1929).

APPROPRIATION FOR NON-CORPORATE PURPOSE

(No. 8428—*E. L. M.—June 9, 1934—1½ pp.*)

The corporate fund of the city can be appropriated and expended only for corporate purposes.

The Mayor or City Council has no power to remunerate from the corporate fund a person for injuries caused by a bite of a vicious dog; the remedy of such injured person is against the owner of the dog.

COMPENSATING POLICEMAN FOR INJURIES

(No. 8603—*E. L. M.*—December 27, 1934—2½ pp.)

The city has no power to grant remuneration for personal injuries caused by police officers performing their duties.

EXPENDITURES FOR CITY GREETER

(No. 8405—*Chairman, Committee on Finance—A. F. G.*—May 23, 1934—6½ pp.)

The claim for the payment of services as City Greeter cannot legally be paid by the city since that office was never established by ordinance nor was there an appointment made by the Mayor.

Expenditure for a City Greeter is probably not such a corporate purpose that public monies can be used therefor.

Citations:

Statutes: Cities and Villages act, art. VI, secs. 2, 3, 5.

Ill. Private Laws (1867), Vol. 1, p. 771.

Cases: Norton v. Shelby County, 118 U. S. 425 (1886).

Ward v. Cook, 78 Ill. App. 111 (1898).

McCue v. County of Wapello, 56 Iowa 698.

People v. Potter, 63 Cal. 127 (1883).

Law v. People, 87 Ill. 385, 402 (1877-78).

Potts v. City of Cape May, 66 N. J. L. 544 (1901).

Other reference: Throop, Public Officers, sec. 661.

APPROPRIATIONS FOR ADVERTISING FOR CONVENTIONS

(No. 7109—*Manager, Bureau of Conventions, Chicago Association of Commerce—M. F. M.*—September 2, 1931—1½ pp.)

The City of Chicago is not authorized to appropriate for advertising or publicity for the purpose of securing conventions.

Citation:

Statute: Cah. '31, 24: 65 (2).

APPROPRIATION FOR POOR RELIEF

(No. 7850—*Commissioner of Public Works—L. H.*—December 22, 1932—1½ pp.)

The city has no power to use its funds for the relief of the indigent or to distribute any supplies to the poor.

Poor Relief: By virtue of statute approved March 6, 1936, amending sec. 2a of art. VII and sec. 1 of art. VIII and adding sec. 102 to art. V of

the Cities and Villages act, the city is empowered to levy a 3 mill tax for poor relief.—Ill. Laws (2nd sp. sess. 1936), p. 25.

An ordinance was passed on July 1, 1936, providing for the administration of relief and support of poor and indigent persons lawfully resident within the city; the office of Commissioner of Relief was created to superintend and care for such relief.—Coun. J. (1936-37), p. 1958.

APPROPRIATION FOR INTEREST ON TAX ANTICIPATION WARRANTS

(No. 6577—Chairman, Committee on Finance—E. C. H.—January 1, 1930—4½ pp.)

Any deficiency caused by loss and cost in the collection of taxes and interest on tax anticipation warrants should be appropriated for in the annual appropriation bill.

Citations:

Constitution: Illinois, art. IX, sec. 12.

Statutes: Ill. Laws (Sp. sess. 1930), p. 8.

Cah. '29, 146A: 2, 3.

EXECUTION AND APPROPRIATIONS FOR SUPERSEDEAS BOND

(No. 8956—J. F. G.—December 9, 1935—1½ pp.)

The authority to execute a supersedeas bond in accordance with an order of court in litigation within the corporate powers of the city is necessarily implied from the city's power to sue and be sued.

The City of Chicago and the Mayor are primarily liable upon a supersedeas bond and, if judgment is entered upon such bond, the City Council may be compelled to appropriate the amount of money necessary to pay the judgment.

APPROPRIATION FOR CLAIMS ARISING FROM LAWSUITS

(No. 6679—City Comptroller—J. W. B.—May 24, 1930—3 pp.)

The words "for payment of claims in connection with defense of suit" of the city, as used in an appropriation, mean payment for services rendered to city by valuers, engineers, and others who worked for the city in the preparation of the suit.

The word "claim" in connection with a lawsuit means a claim for services rendered or property furnished under contract.

Citations:

Cases: Howell v. City of Buffalo, 15 N. Y. 512 (1857).

Jones v. Lucas County Commissioners, 48 N. E. 882 (1897).

CONTINUATION ORDINANCE—CONTINGENT APPROPRIATIONS

(No. 7905—City Comptroller—L. H.—January 18, 1933—2 pp.)

The continuation ordinance of January 5, 1933, includes expenditures for the purpose of hiring employees who were working at the close of 1932 on activities financed by appropriations which were originally made subject to a contingency or further order of the City Council where the contingency occurred or the Council later acted so as to remove the restriction; also is included any necessary expenditures other than salaries to the minimum amount necessary to the maintenance of absolutely essential functions of government. This authority automatically expires as soon as the appropriation bill for 1933 becomes effective.

Citations:

Statute: SH '31, 24: 104.

Ordinance: Coun. J. (1932-33), p. 3269 (Continuation ord.).

(2) *Passage, Amendment, and Transfer of
Appropriations.**

VETO AND AMENDMENT OF APPROPRIATION ORDINANCE

(No. 6618—City Comptroller—C. J. A. and E. C. H.—March 11, 1930—14 pp.)

The tax anticipation warrants of 1930 are valid and are based on a valid annual appropriation ordinance and a valid tax levy.

The Mayor has power to veto an ordinance, either in whole or in part, and the veto may be made at the same meeting at which the ordinance is passed. A portion not vetoed by the Mayor remains in force. Statutory regulations as to the manner in which a veto should be returned by the Mayor are merely directory and not mandatory.

The City Council has the power to reconsider at a recessed session the vote by which it passed items in an amendatory ordinance and that reconsideration does not require a two-thirds vote but only a majority vote. The reconsideration of the vote by which the vetoed items were passed repeals the items vetoed.

The City Council has been delegated power by the General Assembly to change the date of its regular meeting.

Whether the City Council uses the expression "Annual Appropriation ordinance" or "annual appropriation ordinance as amended" in

*See Opinion No. 7339, p. 738, on the itemization of appropriations.

amending the annual appropriation ordinance makes no difference, since the only ordinance that could be amended at the time would be the ordinance as it then existed.

Citations:

- Ordinances:** Code '22: 10.
Annual Appropriation ord. of 1930.
Amendatory ord. Jan. 18, 1930.
Tax Levy ord. Feb. 4, 1930.
- Statutes:** Cah. '29, 24: 40, 49, 50.
- Cases:** Baar v. Kirby, 118 Mich. 392 (1898).
Commonwealth v. Fitler, 136 Pa. 129 (1890).
Baltimore v. Gorter, 93 Md. 1 (1901).
- Other references:** 2 Dillon, Mun. Corp. (5th ed.) sec. 578.
Roberts, Parliamentary Law (1923), p. 124.
Roberts' Rules of Order, sec. 27.

**AMENDMENT OF APPROPRIATION ORDINANCE—ORDINANCE
ORDERING EMPLOYMENT—ALDERMAN'S SALARY**

(No. 6957—City Comptroller—L. H.—June 16, 1931—11½ pp.)

The city's appropriation ordinance may be amended at the next regular meeting of the City Council occurring not less than five days after its passage and it may be amended by repeal or reduction at a regular meeting held within fifteen days after the first regular meeting occurring not less than five days after passage of the ordinance; no further or different amendments of the appropriation ordinance are permissible under the law.

An ordinance directing employment of certain persons, whose employment is provided for in the appropriation bill, does not amend or correct the appropriation bill.

An ordinance directing employment of an employee who would receive a higher salary by virtue of his title than the salary of the employee provided for by the appropriation ordinance constitutes an additional appropriation in amendment to the appropriation ordinance.

The salary of an alderman is provided by statute and must be paid whether provided in the appropriation ordinance or not.

Opinion No. 8553 of November 8, 1934, to the Chairman of the Committee on Finance discusses the same point as the above opinion.

RECONSIDERATION OF VOTE ON APPROPRIATIONS— SESSIONS OF CITY COUNCIL

(No. 6606—Deputy City Comptroller—J. W. B., C. J. A. and E. C. H.—
February 21, 1930—12½ pp.)

The Mayor may veto an ordinance at any time after its passage before the next regular council meeting which must occur not less than five days after the meeting at which the ordinance was passed.

The City Council has the right to reconsider appropriation items at the same meeting at which those items were vetoed, regardless of whether the items have been vetoed.

The reconsideration of the vote by which appropriation items were passed *ipso facto* revokes the passage of those items.

The reconsideration of a vote requires only a majority vote regardless of the vote necessary to adopt the motion reconsidered.

The City Council has power to change the dates of its regular meetings.

The City Council has power to remain in session for a period of several days by the process of recessing.

In amending a given ordinance the City Council amends the ordinance as it then exists, which includes previous amendments, regardless of whether the Council refers to the ordinance "as amended."

The annual appropriation ordinance of January 3, 1930, as amended January 13, 1930, and January 18, 1930 (both as of the regular meeting of January 8, 1930), and not vetoed by the Mayor, is legal and valid.

The tax levy ordinance of February 14, 1930, is legal and valid.

Citations:

Ordinances: Code '22: 10.

Annual Appropriation ordinance of 1930.

First Amendatory ord., Jan. 13, 1930.

Tax Levy ord., Feb. 4, 1930.

Statute: Cah. '29, 24: 18, 40.

Cases: Baar v. Kirby, 118 Mich. 392 (1898).

Commonwealth v. Fittler, 136 Pa. 129 (1890).

Baltimore v. Gorter, 93 Md. 1 (1901).

Other references: 2 Dillon, Mun. Corp. (5th ed.), sec. 578.

Roberts' Rules of Order, p. 78.

Roberts, Parliamentary Law (1923), pp. 93, 124.

**TRANSFERS AND CREATION OF POSITIONS AS AMENDMENTS
OF APPROPRIATION BILL—SALARY INCREASES**

(No. 7824—City Comptroller—L. H.—November 30, 1932—3 pp.)

The authority of the City Council to make transfers does not confer power upon it to make a new appropriation.

Where an appropriation ordinance provides for an indefinite number of positions, items in a new ordinance which shift the employees seem to be authorized by law, but an ordinance which establishes new positions not included in the appropriation ordinance is an amendment of the appropriation ordinance which the City Council has no power to make.

An order of the City Council which gives the Board of Local Improvements the authority to increase the compensation of an employee, who, on the basis of his civil service standing, is entitled to it as an automatic increase, is valid, since the increase is charged against an appropriation which can be used for the purpose of allowing extra compensation, even though the form of the order indicates a change in the salary of the employee.

Citations:

Statute: SH '31, 24: 102.

Ordinances: Coun. J. (1932-33), pp. 3033, 3052-53, 3081.

**EMPLOYMENT OF ADDITIONAL HELP AS APPROPRIATION
AMENDMENT**

(No. 6947—City Comptroller—L. H.—June 12, 1931—5½ pp.)

A special ordinance purporting to authorize employment by the Board of Local Improvements of additional help is void as this is a revision of the annual appropriation bill and such revisions can take place subsequent to enactment of the appropriation ordinance only within the time limit specified in the state statute.

Citations:

Statute: Ill. Laws (Sp. sess. 1930), p. 8.

SH '24: 104.

Ordinance: Coun. J. (1931-32), pp. 275-77.

Cases: McGovern v. Chicago, 281 Ill. 264 (1914).

People v. Sergel, 269 Ill. 619 (1915).

APPROPRIATION TRANSFERS

(No. 7316—City Comptroller—L. H.—November 24, 1931—3½ pp.)

The City Council has been given control of the city's finances and has been authorized by statute to make appropriation transfers from

one corporate purpose to another within a department, hence a proper order of the City Council to that effect must be observed by the Comptroller and the Treasurer.

If obligations have been incurred that must be met out of the funds to be transferred, the transfer should not be made.

Citation:

Statute: SH '29, 24: 102.

VETO AND EXPENDITURES UNDER APPROPRIATION TRANSFER ORDINANCE

(No. 7105—Mayor—L. H.—September 1, 1931—2 pp.)

Although the Mayor may veto separate items of an appropriation ordinance, he must approve or veto as a whole an ordinance providing for the transfer of appropriations.

The transfer ordinance provides merely for payment and the Mayor can, by an executive order, direct department heads not to use the money for purposes that would be illegal or detrimental to the city's best interests.

APPROPRIATION TRANSFERS BY COUNCIL ORDER

(No. 8863—City Comptroller—A. A. S.—September 4, 1935—2 pp.)

Monies may be transferred from one account to another by a Council order passed by a two-thirds vote of the City Council, as this does not amount to an amendment of the appropriation ordinance; however, an ordinance is preferable to an order in making such transfer.

Citations:

Statute: Cities and Villages act, art. III, sec. 13; art. VII, sec. 2(a).

Ordinance: Coun. J. (1934-35), p. 2074, amended pp. 2127, 2422.

Other reference: Op. Corp. Counsel (1923-24), p. 322.

TRANSFER OF FUNCTION TO ANOTHER DEPARTMENT

(No. 8901—Commissioner of Public Works—J. F. G.—October 23, 1935—2½ pp.)

While appropriations from the Vehicle Tax Fund to the Department of Public Works may not be transferred by the City Council to the Department of Streets and Electricity, the City Council may authorize the Department of Public Works to carry on a Works Progress Administration street repair project after the Department of Streets and Electricity has exhausted its funds for carrying it on, and au-

thorize a transfer of any unencumbered balance of a Vehicle Tax Fund appropriation in one account to another account in the Department of Public Works against which withdrawals may be made for the project.

Citation:

Statute: Cities and Villages act, art. VII, sec. 2(a).

OPINION OF FOREGOING SYNOPSIS

Reference is made to your verbal request for advice as to how you may carry out the obligation of the city under a WPA project for the improvement and repair of streets in the City of Chicago.

We have been informed that this work is now being performed by the Department of Streets and Electricity by virtue of an appropriation from the vehicle tax fund. The difficulty is that all of the vehicle tax fund appropriated for expenditure by the Department of Streets and Electricity is insufficient to complete that part of the project undertaken for the year 1935.

We have been informed also that a considerable part of the vehicle tax fund appropriated under the heading of "miscellaneous general government" and for the "Department of Public Works" is unexpended and unencumbered. If these appropriations could, by transfer, be made available for expenditure for the improvement and repair of streets included in the WPA project the work undertaken for the year 1935 could be completed.

Section 2a of article VII of the Cities and Villages act provides that the City Council

"* * * shall, at any time after the first half of each fiscal year, have power, by a two-thirds vote of all the members of such body, to make transfers within any department or other separate agency of the municipal government, of sums of money appropriated for one corporate object or purpose to another corporate object or purpose, but no appropriation for any object or purpose shall thereby be reduced below an amount sufficient to cover all obligations incurred or to be incurred against such appropriation; * * *"

That part of the vehicle tax fund appropriated under the heading of "miscellaneous—general government" may be utilized for the WPA project if the City Council shall pass an ordinance authorizing a transfer of the vehicle tax fund appropriated for other specific objects under "miscellaneous—general government" to an appropriate account under miscellaneous—general government" against which warrants may be drawn for expenditures on account of the improvement or repair of streets.

That part of the vehicle tax fund appropriated for the department of public works may not be transferred to the Department of Streets and Electricity under section 2a of article VII of the Cities and Villages act which authorizes only a transfer "within any department or other separate agency of the municipal government," but there is no legal objection to the passage of an ordinance by the City Council authorizing and directing the Department of Public Works to carry on the WPA project after the funds available to the departments of streets and electricity for carrying on said project are exhausted. To enable the Department of Public Works to take over this project the City Council may authorize a transfer of any part of the vehicle tax fund appropriated for other specific objects and purposes within the Department of Public Works which remains unexpended and unencumbered to an appropriate account in the same department against which warrants may be drawn for expenditures in connection with the WPA projects referred to. Since the vehicle tax fund may be used only for the improvement or repair of streets under the statute creating the fund the suggested proceeding would not, in our opinion, constitute an additional appropriation.

APPROPRIATION TRANSFERS AFTER JULY 1ST—BOARD OF ELECTION COMMISSIONERS' EXPENSES

(No. 8255—*Chairman, Committee on Finance—L. H.—December 29, 1933—2½ pp.*)

A transfer of funds may be made after the first half of the fiscal year only when the item of appropriation is sufficient to cover all obligations incurred or to be incurred against it, and the item to which it is to be transferred is an item of appropriation already in existence.

The Board of Election Commissioners is a corporate authority which may incur expenses in connection with election matters and create a debt which the city must defray.

The City Council in authorizing a transfer of funds to the Board of Election Commissioners does not by that act assume any responsibility for the proper use of the funds by the board.

Citations:

Statute: Cities and Villages act, art. VII, sec. 2(a).

Case: Wetherell v. Devine, 116 Ill. 631 (1886).

APPROPRIATION TRANSFER IN PUBLIC SAFETY EMERGENCY

(No. 7237—*Secretary, Chicago Public Library—L. H.—October 30, 1931—4 pp.*)

An emergency affecting the safety of the public will warrant the City Council in transferring an appropriation from the library building fund to the library operation and maintenance fund.

Citation:

Case: People v. Chicago and Alton Railway, 289 Ill. 282 (1920).

C. MANAGEMENT OF CITY FUNDS**(1) Expenditure of City Funds†*

Working Cash Fund: In each city having a population of 150,000 or more inhabitants a "working cash fund" may be created for the purpose of enabling the city to have in its treasury at all times sufficient money to meet demands thereon for ordinary and necessary corporate expenditures.—Ill. Laws (1st sp. sess., 1930), p. 24.

The statute authorizing cities having a population of 150,000 or more to establish a "working cash fund" and to issue, without referendum, \$12,000,000 bonds for such purpose was held constitutional in *Mathews v. Chicago*, 342 Ill. 120 (1931). The classification as to population was held neither special nor unreasonable.

*See also pp. 123-126.

†See also opinions, pp. 773-776, on claims against the city and "Note Concerning Federal Excise Tax," p. 12.

EXPENDITURES PENDING PASSAGE OF APPROPRIATION ORDINANCE

(No. 8265—City Comptroller—L. H.—January 9, 1934—3½ pp.)

Pending the passage of the annual appropriation ordinance, the amount of expenditure allowable under any item in the previous appropriation ordinance is the amount appropriated for that item as amended by transfers.

EXPENDITURES PRIOR TO EFFECTIVE DATE OF APPROPRIATION ORDINANCE

(No. 6838—City Comptroller—L. H.—February 20, 1931—3½ pp.)

Expenditures under the annual appropriation ordinance of the city, which occurred within the period covered by the ordinance but before the publication necessary to make it a valid enactment, are valid when the ordinance becomes effective.

Citations:

Statutes: Cities and Villages act, art. VII, sec. 4, as amended June 27, 1930.

Cases: Wartman v. City of Philadelphia, 33 Pa. 202 (1859).

Johnson v. Fay, 82 Mass. 144 (1860).

Cordiner v. Dear, 55 Wash. 479 (1909).

Denver and Rio Grande Railroad Co. v. Brennaman, 45 Colo. 264 (1909).

SIGNATURE ON PAYROLL SUBWARRANTS

(No. 8678—City Comptroller—J. F. G.—February 18, 1935—3 pp.)

A check-writing machine which imprints the paymaster's signature may be employed on pay roll subwarrants.

Citation:

Statute: 3 Jones, Illinois Statutes Annotated, 21.203.

USE OF CURRENT REVENUES TO PAY PAST OBLIGATIONS

(No. 8838—City Comptroller—J. F. G.—August 9, 1935—4½ pp.)

So much of the 1935 corporate fund may be used for the payment of obligations of prior years as is not immediately necessary to pay 1935 obligations, if the Comptroller believes that there will be sufficient taxes from the levies of prior years to satisfy the liens of outstanding tax anticipation warrants and to reimburse the 1935 corporate fund for the money temporarily borrowed.

The 1935 corporate fund, being used temporarily to pay obligations

of past years, may be reimbursed from taxes collected on account of levies of past years, subject to the lien of outstanding tax anticipation warrants.

Citations:

Statute: Cities and Villages act, art. VII, secs. 2, 17.

Case: Gates v. Sweitzer, 347 Ill. 353 (1932).

OPINION OF FOREGOING SYNOPSIS

In your letter of August 6th, 1935 you request our opinion as to whether or not 1935 corporate fund revenue may be used temporarily for the payment of obligations of the corporate fund for the years prior to 1935 and, if so, whether the 1935 corporate fund may be reimbursed from the corporate fund revenues of the years prior to 1935 after the principal and interest of outstanding tax warrants, which are a first lien upon the uncollected taxes for the years prior to 1935, have been paid.

By senate bill No. 549, passed by the 59th General Assembly and approved by the Governor, it was provided "that estimates of taxes to be received from the levies for the years prior to 1935 for general corporate purposes and estimates of the liabilities of the general corporate fund including the principal of all anticipation tax warrants and all temporary loans and all accrued interest thereon outstanding and unpaid on January 1, 1935 shall not be included in any such (annual appropriation) ordinance"; also that the City Council shall not be required "to appropriate from the general corporate fund of the corporation for the payment of any judgment for which a special tax shall have been authorized by law, or for the payment of any other liability of the general corporate fund including the principal of all anticipation tax warrants and all temporary loans and all accrued interest thereon outstanding and unpaid on January 1, 1935." (Sec. 2a, article VII, Cities and Villages act.) By the same bill it is also provided that the City Comptroller, in submitting a report of his estimates for the annual appropriation bill, shall not include among the estimated liabilities of the general corporate fund "judgments for the payment of which a special tax shall have been authorized by law and all other liabilities of the general corporate fund including the principal of all anticipation tax warrants and all temporary loans and all accrued interest thereon outstanding and unpaid on January 1, 1935" and shall not include among the estimates of current assets "taxes to be received from the levies of years prior to 1935 for general corporate purposes." (Sec. 17, article VII, Cities and Villages act.)

By senate bill No. 548, passed by the 59th General Assembly, it was provided that monies transferred from the working cash fund "for disbursement prior to the 1st day of January, 1935, shall be reimbursed from all taxes levied for general corporate purposes prior to the year 1935 which are in excess of the amount or amounts required to pay any anticipation tax warrants and interest thereon and all general corporate fund obligations remaining unpaid on January 1, 1935."

It was intended by the foregoing recent legislation that a new start should be made by the corporate authorities of the city for the general corporate fund as of January 1, 1935; that all taxes levied for general corporate purposes for any year prior to 1935 should be applied, first, to the payment of the principal and interest of tax warrants issued against the particular year's tax levy; second, to the payment of any obligation incurred at any time prior to the year 1935 remaining unpaid on January 1, 1935; and third, for reimbursement of the working cash fund for monies transferred from such working cash fund to the corporate fund at any time prior to the first day of January, 1935.

Inasmuch as tax warrants must be redeemed before taxes for the years

prior to 1935 may be applied to the payment of obligations as of January 1, 1935, payment of such obligations will be unreasonably delayed unless the Comptroller is authorized to borrow temporarily from the 1935 corporate fund revenue for the payment of such obligations. If the City Comptroller feels reasonably assured that there will be sufficient taxes collected from the levies for the years prior to 1935 to satisfy the liens of outstanding tax anticipation warrants and to reimburse the 1935 corporate fund revenue for any funds temporarily borrowed for the payment of obligations of the years prior to 1935, the Comptroller may undoubtedly use so much of the 1935 corporate fund revenue for such purpose as is not immediately necessary to meet 1935 obligations.

In *Gates v. Sweitzer*, 347 Ill. 353, 359, the court said:

"Municipal officers have no right to divert monies from one fund to another and different fund for which it was not appropriated. But the word 'divert' is used in the sense of turning such fund permanently from its purpose or the final appropriation of it to some other use. If, as counsel for appellees argue, the commissioners had a right to, and did, temporarily borrow sufficient idle bond funds or other funds for the benefit of a fund having a stated and sufficient income to re-pay the sum borrowed, as the bond fund had, and with the intention that it shall be so re-paid, such is not a diversion of funds, for the fund from which the money is taken holds the credit against bond interest and principal fund and is not depleted. * * * Liabilities against municipalities accruing during the year for which the levy is made, frequently must, in order to preserve the credit of the municipality, be paid prior to the collection of the tax, and it is the duty of the officers in charge of the levy and collection of taxes to use sound business judgment that the credit of the municipality be not impaired."

There can be no doubt that if the 1935 corporate fund revenue is used temporarily for the payment of obligations for prior years it may be reimbursed from taxes collected on account of levies made for the years prior to 1935 subject, of course, to the lien of outstanding tax anticipation warrants.

PAYMENT FROM SALARY ACCOUNT FOR SERVICES NOT RENDERED DEPARTMENT

*(No. 6762—Commissioner of Buildings—E. M. K.—September 3, 1930
—1 p.)*

The Commissioner of Buildings may not legally pay for services not rendered to the Department of Buildings out of the salary account of the Department. That action would constitute a diversion of public funds for unauthorized purposes.

An order of the City Council authorizing the Commissioner of Buildings to so divert public funds is a nullity.

Citation:

Reference: McQuillin, *Mun. Corp.* (2nd ed.), sec. 2761, p. 716.

SALARY PAYMENT OF "DEPUTIES ACTING FOR THE MAYOR"

(No. 7482—City Comptroller—L. H.—March 7, 1932—8½ pp.)

The Comptroller has the right to pay during the year of 1932 the officers designated as "Deputies Acting for the Mayor" pending the passage of the appropriation bill for that year.

Citations:

- Statute: SH '31, 24: 85.
- Ordinances: Coun. J. (1931-32), p. 1569.
Id. (1931-32), p. 1626.
Code '31: 1, 3, 4.

PAYMENT OF AUTHORIZED LEGAL SERVICES

(No. 6595—City Comptroller—L. H.—January 31, 1930—4½ pp.)

Where there is a discrepancy between words and figures, the words should prevail in interpretation.

Legal services duly authorized by the City Council and accepted by the city should be paid for out of the fund described by the City Council for the payment of those services without regard to the number of the fund.

Citations:

- Ordinances: Coun. J., April 10, 1929, p. 6024.
Coun. J., Dec. 12, 1929, p. 1689.
- Statute: SH '29, 24: 102.
- Case: McGovern v. City, 281 Ill. 373 (1918).

FUND FOR ADVANCE SALARY PAYMENTS

(No. 7098—City Comptroller—L. H.—August 28, 1931—2½ pp.)

The creation by the City Council of a fund for advance payments on salaries is valid or invalid depending upon whether such fund is or is not lawfully administered.

Citation:

- Ordinance: Coun. J. (1931-32), p. 822.

**DISBURSEMENT OF FUNDS WHEN INJUNCTION PENDING—
SUBWAY EXPENSES FROM TRACTION FUND**

(No. 6860—City Comptroller—C. J. A. and E. C. H.—April 1, 1931—4½ pp.)

In the absence of an injunction or restraining order of a court, the institution or pendency of a suit to prevent or to enjoin the disbursement of funds does not alter the power or duties of the Comptroller to disburse public funds.

The Comptroller would not be personally liable for expenditures regularly made in accordance with the Council appropriation though a court ultimately holds the ordinance in question to be invalid.

The traction fund may be used for the purpose of acquiring or constructing subways in the streets of the city.

Citations:

Statute: Cah. '29, 102: 12.

Cases: Fergus v. Brady, 277 Ill. 272 (1917).

Barsaloux v. Chicago, 245 Ill. 598 (1910).

Other references: Opinion No. 6758 (this volume, p. 860).
Opinion No. 6845 (this page).

STREET WIDENING EXPENSES FROM TRACTION FUND*

(No. 6845—City Comptroller—L. H.—March 12, 1931—2½ pp.)

It is proper to pay the cost of widening North State street from the traction fund, since that widening is being undertaken with a view to building a subway for local transportation purposes.

Citation:

Case: Barsaloux v. Chicago, 245 Ill. 598 (1910).

PAYMENTS OUT OF TRACTION FUND FOR TRAFFIC COUNTERS*

(No. 6946—City Comptroller—L. H.—June 12, 1931—2½ pp.)

If the traffic counters employed under a Council order were actually employed for the purposes of the litigation connected with subways, they may be paid out of the traction fund.

Citation:

Ordinance: Coun. J. (1930-31), p. 4498 (Appropriation).

Case: Barsaloux v. Chicago, 245 Ill. 598 (1910).

TRACTION FUND FOR SUBWAY EXPENSES—INVESTMENT OF FUNDS*

(No. 8694—M. H. F.—March 6, 1935—2 pp.)

The 1907 traction ordinances provide that the traction fund be kept and used for the purchase and construction of street railways by the city. The construction of subways is the construction of street railways and is a purpose for which the traction fund may be used.

The city may invest any fund that was set aside for a particular purpose but which is not immediately necessary for that purpose.

Citation:

Case: Barsaloux v. Chicago, 245 Ill. 598 (1910).

*See Opinion No. 8305, p. 742, on the investment of the Traction Fund in tax anticipation warrants.

**ITEMIZATION OF APPROPRIATIONS—PAYMENTS FOR
TRAFFIC LEGISLATION FROM VEHICLE TAX FUND***

(No. 7339—*Chairman, Committee on Traffic and Public Safety—L. H.*
—*December 3, 1931—2 pp.*)

A specification of purposes for which appropriations are made is necessary, but the extent of itemization is within the control of the City Council.

The power to pay any of the items of appropriation designed for the use of the Council Committee on Traffic and Public Safety out of the vehicle tax fund is very doubtful, as legislation relating to the fund is not a cost or expense of street or alley improvement and repair.

VEHICLE TAX FUND FOR CONSTRUCTION OF SEWER

(No. 7744—*Commissioner of Public Works—J. J. S.—September 12, 1932—1½ pp.*)

Money in the vehicle tax fund may not be used to construct a sewer through donated land.

**DIVERSION OF FUNDS DUE HOUSE OF CORRECTION
EMPLOYEES' PENSION FUND**

(No. 7465—*City Comptroller—L. H.—February 27, 1932—3½ pp.*)

The diversion of funds due to the House of Correction caused by applying them to the purposes of the Juvenile Home cannot operate so as to deprive the House of Correction Employees' Pension Fund of its percentage of the funds.

Citation:

Ordinance: Coun. J. (1931-32), p. 1043.

**MAILING EXPENSES OF CONSTITUTIONAL AMENDMENT
PAMPHLETS**

(No. 7433—*Committee on Finance—L. H.—January 29, 1932—2½ pp.*)

The city must pay the expense of mailing pamphlets about proposed amendments to the Constitution which the law requires to be supplied by the Secretary of State and mailed by the Board of Election Commissioners to every voter.

Citation:

Statute: City Election act, art. I, sec. 7.

*See Opinion No. 7573, p. 722, on the itemization of appropriations.

USE OF WATER FUND FOR SEWAGE EXPENSES

(No. 6542—*City Comptroller—L. H.—November 15, 1929—2 pp.*)

The water fund may be drawn upon to pay sewage expense, in this case, the cost of a sewage pumping station, when those expenses are deemed necessary to preserve the purity or the wholesomeness of the city's water.

Citation:

Statute: Cah. '27, 24: 1067.

CONTINGENT FUND FOR PUBLICITY EXPENSES

(No. 6735—*Acting Commissioner of Police—C. J. A.—July 29, 1930—4 pp.*)

Publicity services for the police department may be paid for out of the contingent fund if they are reasonably necessary to promote the efficiency of the department, are not otherwise appropriated for, and the charges made therefor are comparatively small in amount.

Citations:

Cases: *Dunwoody v. United States*, 22 Ct. Cl. 269 (1866-67).

Atchison, Topeka and Santa Fe Ry. v. Topeka, 95 Kan. 747 (1915).

School District v. Western Tube Co., 80 Pac. 155 (1905).

EXPENDITURES FOR POLICE DEPARTMENT SURVEY

(No. 7217—*Commissioner of Police—L. H.—October 27, 1931—3 pp.*)

The Commissioner of Police will be justified, when the appropriation "for salaries in the Bureau of Criminal Investigation" is transferred to that "for expenses other than salaries incident to the establishment of the Bureau of Criminal Investigation," to use this latter appropriation to obtain a survey and plans from the Institute of Public Administration for the reorganization of the police department, since an appropriation for such bureau might be interpreted to authorize a reorganization survey as a necessary precedent to the creation of the new bureau.

Citation:

Case: *McGovern v. Chicago*, 283 Ill. 271 (1918).

USE OF BRIDGE FUND FOR VALUATION EXPENSES

(No. 6765—*Commissioner of Public Works—R. N. L.—September 8, 1930—2½ pp.*)

Charges for evaluating property in connection with the construction of a bridge can properly be paid out of the fund appropriated for the construction of the bridge.

Citations:

Ordinance: Coun. J. (1930-31), p. 2660.

Case: Barsaloux v. Chicago, 245 Ill. 598 (1910).

PAYMENT OF CONDEMNATION AWARDS ON ROBEY STREET IMPROVEMENT

(No. 7113—*City Comptroller—L. H.—September 3, 1931—2 pp.*)

Monies accumulated in the Robey street fund may be used to pay condemnation awards on the Robey street improvement on City Council order.

*(2) Investment of City Funds**

**INVESTMENT OF SPECIAL FUNDS IN TAX WARRANTS—
WITHHOLDING PAYMENT OF VOUCHER CLAIMS**

(No. 7454—*City Comptroller—L. H.—February 18, 1932—5 pp.*)

Money in special funds may be used temporarily to purchase tax anticipation warrants and municipal bonds of the city, if the monies are not required immediately for the purposes for which they have been accumulated. However, the funds should be maintained in a condition sufficiently liquid to allow the meeting with reasonable promptness of accruing lawful demands.

The city's officers are not justified in withholding payment of vouchers, which are contractual obligations drawn against specific funds merely because the aggregate of funds is becoming low, unless there is some extreme emergency which threatens to impair disastrously the city's credit.

The Comptroller has no discretion to withhold payment on vouchers, which are contractual obligations, drawn against specific funds, in order to use the money in the funds to meet payroll expenditures.

*See Opinion No. 8694, p. 737.

PURCHASE BY CITY OF TAX ANTICIPATION WARRANTS

(No. 7397—*City Comptroller—L. H.—December 23, 1931—2½ pp.*)

The Comptroller may use special assessment or other funds held in trust by the city to purchase tax anticipation warrants.

Citation:

Reference: Opinion No. 7259 (this volume, p. 871).

INVESTMENT OF LIBRARY BUILDING FUNDS IN TAX WARRANTS

(No. 7745—*Secretary, Chicago Public Library—L. H.—September 15, 1932—2 pp.*)

The City Council, but not the board of directors of the Public Library, by ordinance may invest the surplus cash of the Public Library Building Fund in tax anticipation warrants issued against the levy for maintenance and operation, and use the proceeds for the payment of bills outstanding against the Maintenance and Operation Fund.

Citations:

Statutes: SH '31, 81:1.
Id. 24: 665.

INVESTMENT OF WATER FUND IN TAX ANTICIPATION WARRANTS

(No. 7489—*City Comptroller—L. H.—March 11, 1932—2½ pp.*)

If the water fund contains enough to cover the amount demanded in payment of the contractual obligations that are charged to the fund, the city has no alternative but to pay these obligations and cannot under these circumstances, invest the money in tax anticipation warrants.

The City Treasurer is required to keep money received from water loan bonds and water rents in a separate fund and he cannot use it for any other purpose than that for which it is received. The money in the water fund can be used for the purchasing of tax anticipation warrants only when the money is not necessary for the purpose for which it was received.

Citations:

Case: *People v. Hummel*, 215 Ill. 71 (1905).

Other reference: Opinion No. 7454 (this volume, p. 740).

INVESTMENT OF SPECIAL FUNDS IN TAX ANTICIPATION WARRANTS—EXPENDITURES FROM WATER FUND

(No. 7434—*Commissioner of Public Works—L. H.—January 30, 1932—5½ pp.*)

The head of a department should proceed on the theory that monies appropriated from a particular fund will be available unless he is notified by the Comptroller that there is a shortage.

Money withdrawn from the water fund and the vehicle tax fund to buy tax anticipation warrants and to pay salaries is not withdrawn permanently, but is loaned out at interest.

Direct payment from the water fund of the teachers' salaries is impossible, but money may be taken from the fund to purchase school tax anticipation warrants.

Citation:

Case: *People v. Hummel*, 215 Ill. 71 (1905).

INVESTMENT OF TRACTION FUND IN SCHOOL WARRANTS

(No. 8305—*L. H.—February 17, 1934—1½ pp.*)

The traction fund may be invested in Board of Education tax anticipation warrants since statutes infer that these warrants are to be treated the same as city tax anticipation warrants, and since the City Council levies the tax.

Citations:

Statutes: Municipal Funds act, sec. 2.
School act, sec. 132.

INVESTMENT OF SURPLUS MONIES IN SCHOOL WARRANTS—COUNCIL ORDER OF EXCESSIVE LOANS

(No. 7679—*City Comptroller—L. H.—August 1, 1932—9½ pp.*)

The Comptroller must not invest surplus funds of the city in Education Fund tax warrants if these surplus monies would be immediately necessary for the purpose for which they were set aside. The *People ex rel. Mathews v. Bd. of Education* decision does not limit the amount that may be issued of either education tax warrants or teachers' pay warrants.

The Comptroller is under a duty to advise the Council against authorizing loans in excess of legal limits. If the Council orders such excessive purchase of school warrants, such purchase may be enjoined but the Comptroller would not be liable if he acted in pursuance to the order.

The use of teachers' warrants in payment of taxes was intended by the legislature to apply only to the taxes for 1932 and future years.

Citations:

- Statutes:** SH '31, 24: 666 (Municipal Funds act).
Id. 24: 117 (Cities and Villages act, art. VII, sec. 17).
Ill. Laws (1931-32), p. 21 (Municipal funds).
Case: People v. Board of Education, 349 Ill. 390 (1932).

SALE OF WARRANTS TO PRIVATE BUSINESS—SCHOOL WARRANTS WITH OVER FOUR PER CENT INTEREST

(No. 7868—City Comptroller—L. H.—December 29, 1932—4 pp.)

The city may sell its warrants drawn against the tax levies of 1931 and/or 1932 for the general corporate fund, bond and interest fund, and others to private companies.

The city may not invest in school warrants bearing a higher rate of interest than four per cent.

Under extraordinary circumstances, the City Council has authority under its general power to control the finances of the city, to order the purchase of six per cent Board of Education warrants where the Board of Education by resolution promises to pay all interest in excess of four per cent and the prospective purchasers of these warrants from the city agree never to make any claim on the city for interest in excess of the statutory four per cent limit, as no loss of any kind will result to the city.

Citation:

- Ordinance: Coun. J. (1932-33), pp. 3188-89 (Tax anticipation warrants).

USE OF GAS TAX FUND TO PURCHASE REFUNDING BONDS

(No. 7345—Alderman, 48th Ward—L. H.—December 7, 1931—1 p.)

The use of unexpended monies in the gas tax fund for the purchase of refunding bonds of the city would be unconstitutional.

Citation:

- Constitution: Illinois, art. IV, sec. 20.

(3) Depositaries of City Funds

PREVIOUS ORDINANCES ON DEPOSITARY BONDS

(No. 7327—City Treasurer—L. H.—November 30, 1931—1½ pp.)

The 1931 City Code preserves from repeal all previous ordinances relating to depositary bonds, including the ordinance of January 10, 1916, and sections 30 and 31 of the 1922 City Code.

Citations:

Ordinances: Coun. J. (1915-16), vol. 2, p. 2827.

Code '22: 30 (as amended April 27, 1931), 31.

Code '31: 67, 4303.

BIDS AND ADVERTISEMENTS FOR CITY DEPOSITARIES

(No. 7211—City Comptroller—L. H.—October 24, 1931—7½ pp.)

When a bidder presents its bid for a city depositary, it should state the amount of deposits for which it is bidding, and it should be required to furnish a corporate surety bond except in the cases of large banks that can qualify as active banks.

The advertisement for such bids should state that the depositaries named will be the depositaries for the entire ensuing fiscal year.

When the City Council accepts the bidders as depositaries it should specify the amount which may be deposited in each of them and specify that they should file their bonds for the amount fixed within a designated time preferably before the first of January.

When a depositary has been named and its bond has been approved, it should not be allowed to substitute other bonds except when the Council permits it in an emergency caused by the insufficiency of the bond already given.

The amount of the deposits should at no time be increased beyond the amount fixed when the bank was designated as a depositary.

No new depositaries should be named after the beginning of the fiscal year except in the case of an emergency where the funds of the city are endangered.

In the case of a consolidation or other change of organization during the year, the deposits of the city should be withdrawn unless the City Council declares there is an emergency which endangers the funds of the city.

Preference in making deposits should be given to banks which have furnished corporate surety bonds.

Citation:

Ordinance: Code '31: 65.

ADVERTISEMENTS FOR PAYMENT OF INTEREST ON CITY DEPOSITS

(No. 8534—City Comptroller—J. F. G.—October 23, 1934—2 pp.)

The Comptroller must advertise for bids for the payment of interest on city deposits once a year and he is not subject to any requirement that such advertisement be inserted for at least ten days in a newspaper.

Citations:

Statute: Cities and Villages act, art. XII, pt. 2, sec. 5.

Ordinance: Code '31: 65.

AWARD OF BID FOR CITY DEPOSITARIES

(No. 7374—City Comptroller—L. H.—December 14, 1931—4½ pp.)

Bids for the right to act as city depositaries cannot be awarded on the basis of an interest rate equal to the average monthly rate for call money on the New York Stock Exchange; hence any such direction by the City Council to the Comptroller would be futile.

Awards for depositaries of city funds should be made to the highest bidder upon the basis of an entire year and not for any smaller period.

Citation:

Statute: City Depositaries act, sec. 5.

INTEREST ON CITY DEMAND DEPOSITS

(No. 8182—City Comptroller—L. H.—October 2, 1933—5 pp.)

The Federal Banking act of 1933 does not prohibit interest payments on demand deposits of the city and the city is required by state law to receive interest on its deposits.

Citations:

Statutes: Cities and Villages act, art. XII.

Federal Banking act (Glass-Steagall bill, 1933), sec. 11.

OPINION OF FOREGOING SYNOPSIS

Your letter relative to interest on city funds was duly received. Answer was delayed in order that we might obtain necessary information.

You state in your letter that the two banks which are the two active banks for the current year have taken the position that because certain of the city's deposits which are in their keeping have been segregated and are being held as special deposits, they (the two banks) are not obliged to pay interest under the contractual agreement requiring them, as city depositaries, to pay interest on city funds, giving as the reason a provision of the 1933 Federal Banking act which they say prohibits the payment of interest on such accounts.

You state further, in your letter, that these banks have not remitted any

interest on the balances of these accounts, and you ask for our interpretation of the law with respect to the position taken by the banks on the question of paying of interest on these particular deposits.

The Federal Banking act of 1933, also known as the Glass-Steagall act, went into effect on June 16, 1933. Section 11 of the said act contains the following:

"No member bank shall, directly or indirectly by any device whatsoever, pay any interest on any deposit which is payable on demand, provided that nothing herein contained shall be construed as prohibiting the payment of interest in accordance with the terms of any certificate of deposit or other contract heretofore entered into in good faith which is in force on the date of the enactment of this paragraph; but no such certificate of deposit or other contract shall be renewed or extended unless it shall be modified to conform to this paragraph, and every member bank shall take such action as may be necessary to conform to this paragraph as soon as possible consistently with its contractual obligations, provided, however, that this paragraph shall not apply to any deposit of such bank which is payable only at an office thereof located in a foreign country and shall not apply to any deposit made by a mutual savings bank, nor to any deposit of public funds made by or on behalf of any state, county, school district, or other subdivision or municipality, with respect to which payment of interest is required under state law."

It will be observed that there are two distinct provisos limiting the prohibition of the payment of interest on demand deposits. One of these, permits interest on certificates of deposit or other contracts entered into in good faith before the enactment of the new law, but permits no renewal or extension of such contract. The other proviso says that the paragraph containing the prohibition shall not apply to deposits of mutual savings banks or to deposits made by or on behalf of any state, county, school district, or other subdivision or municipality with respect to which payment of interest is required under state law.

As we interpret the act, the proviso last mentioned is the one which affects the situation that has arisen. We understand that the city's funds come squarely within the terms of this proviso, because under article XII of the Cities and Villages act the city is required to advertise for bids for the payment of interest on its funds and to select the highest bidders as city depositaries and to deposit its funds accordingly. This we regard as a requirement under state law that interest should be paid. In any event, it seems to apply to all funds of the city whether in a special fund or otherwise, and we found it inexplicable that the banks in question should draw a distinction between the funds of the city in such special deposits and its other funds.

In order to ascertain on what the said banks based their refusal to pay interest on these special deposits we asked the attorney for the First National Bank to state his position. We received a reply to our request, from which it appeared that the said bank based its contention entirely on the first proviso and ignored the second proviso. The letter of the attorney stated that "we have not considered the question as to whether or not the City of Chicago is required to collect interest on its balances by law," giving as his reason the fact that the first proviso did not permit the renewal or extension of a contract to pay interest. The said letter of the attorney further states that under the bid of the bank its agreement to pay interest is limited to an amount not exceeding \$2,000,000 except as to the special provision regarding the active account. It is then pointed out that inasmuch as the active account ran up to \$5,000,000 on which it paid interest at the rate of one-half of one per cent, the bank does not feel obligated to pay interest on other balances not in the active account except to the extent of the \$2,000,000 which its bid calls for. The letter of the said attorney finally states that when bids are called for the year 1934

"we shall certainly consider the question whether the Illinois statute law requires payment of interest on the accounts of the City of Chicago and probably shall insist on the Federal Reserve Board ruling on the question."

The legal point that occurs to us in this connection is whether the second proviso above quoted is independent and stands by itself or whether it is to be construed as a proviso within a proviso further limiting or modifying the first or main proviso.

There is enough substance to the contention of the bank's attorney to make us feel that there is some doubt on the question, but we look upon the wording of the second proviso as strongly indicating that the bank is wrong and that the second proviso is an independent proviso limiting (independently of the first proviso) the enacting clause which prohibits payment of interest on demand deposits. It will be observed that the enacting clause is a part of the same paragraph as the two provisos. Hence, when the second proviso says that "this paragraph shall not apply to any deposit of * * * public funds made by or on behalf of any state, county, school district, or other subdivision or municipality, with respect to which payment of interest is required under state law," we can only understand and interpret it as meaning that where the statute requires the payment of interest on its funds to a municipality the prohibition against payment of interest in said paragraph does not apply. * * *

* * * * *

BONDS OF CITY DEPOSITARIES

(No. 7416—City Comptroller—L. H.—January 13, 1932—2 pp.)

It appears to be proper to name a bank as a depositary to a certain limit before it presents its bond, but no deposits should be made until the bond is approved and only to the extent that the bond covers the deposits.

APPROVAL OF BONDS OF CITY DEPOSITARIES

(No. 7270—Mayor—L. H.—November 7, 1931—2 pp.)

The sole authority to approve the bonds of city depositaries is vested in the City Council and not in any office designated by it to so approve.

The City Council cannot delegate powers expressly conferred upon it to any other person or body.

APPROVAL OF ADDITIONAL DEPOSITARY BONDS

(No. 6949—City Comptroller—L. H.—June 12, 1931—1½ pp.)

It will not be necessary to obtain an approval of "additional" depositary bonds, when the sureties and their affidavits are the same as on the earlier bonds.

CONSOLIDATION OF TWO CITY DEPOSITARIES

(No. 7032—*Comptroller—L. H.—July 28, 1931—3½ pp.*)

Where two city depositaries consolidate, the City Council may designate, by ordinance, this consolidated corporation as the depositary for the balance of the current fiscal year.

**RETURN OF SURETY BONDS WHEN DEPOSITARIES
CONSOLIDATED**

(No. 7241—*City Comptroller—L. H.—October 31, 1931—2 pp.*)

The surety bonds of two banks named as city depositaries which have consolidated cannot be returned to the consolidated bank without a direct order from the City Council.

Citation:

Ordinance: Coun. J. (1931-32), p. 838.

**ADVERTISING FOR DEPOSITARY BIDS FOR BALANCE OF
FISCAL YEAR—CHICAGO BANKS AS DEPOSITARIES**

(No. 8095—*City Comptroller—L. H.—June 17, 1933—7½ pp.*)

If the City Council directs him to do so, the Comptroller may advertise for bids for city and school depositaries for the balance of the present fiscal year, but such an advertisement for bids and awards under that advertisement must be confined to banks not previously designated as depositaries for the present fiscal year.

The Comptroller must confine bidding to banks doing business within the city, unless the City Council passes a new ordinance opening bidding to banks in other cities.

Citations:

Statutes: Cities and Villages act, art. XII, part 2, secs. 5, 7.
School act, sec. 135.

Ordinances: Code '31, sec. 65.
Coun. J. (1931-32), p. 1575.
Id. (1932-33), p. 3177.

REMOVING SITUS RESTRICTION ON DEPOSITARIES

(No. 7958—*City Council—L. H.—March 1, 1933—1½ pp.*)

The question of adopting an amendment to the Cities and Villages act, which removes the restriction limiting the deposits of the city's funds to Chicago banks only, may be submitted to the voters at the Judicial Election provided the City Council passes an ordinance to that effect thirty days prior to the date of the election.

CHANGE OF BANK'S NAME PENDING DEPOSITARY BID

(No. 6561—City Council—L. H.—December 11, 1929—2 pp.)

If a bank, which is bidding for an award as a city depositary changes its name but keeps substantially the same personnel, after the bids have been made but before the award has been given, it may be regarded as the same institution which made the bid.

CHANGE OF CORPORATE IDENTITY OF CITY DEPOSITARY

(No. 7764—City Comptroller—L. H.—October 8, 1932—5 pp.)

When a bank changes its corporate identity from a state to a national bank, its status as a city depositary and an active bank is not changed.

Citations:

- Cases:** City National Bank of Poughkeepsie v. Phelps, 97 N. Y. 44 (1884-85).
Metropolitan Bank v. Claggett, 141 U. S. 520 (1890-91).
Michigan Insurance Bank v. Eldred, 143 U. S. 293 (1891).

CUSTODY OF CITY DEPOSITARY BONDS

(No. 7415—City Comptroller—L. H.—January 13, 1932—1½ pp.)

It is mandatory by ordinance that the City Clerk place the bonds of city depositaries in the custody of the City Treasurer after they have been approved by the City Council.

Citation:

Ordinance: Code '31: 67.

APPROVAL OF COLLATERAL SECURITY FOR DEPOSITARIES

(No. 6955—City Comptroller—L. H.—June 15, 1931—3 pp.)

What bonds may be accepted by the Comptroller as collateral security for the city's bank deposits is limited by ordinance, and it is specified that the securities accepted must be approved by the Comptroller and the City Council. The bonds must be listed and approved in detail.

Bonds not within the ordinance can be accepted as collateral security only by a special ordinance of the City Council. They must be listed in detail and accepted and approved specifically.

Citations:

- Ordinances: Coun. J. (1915-16), p. 2832.
Code '22: 30.

RETURN OF INTEREST ON DEPOSITARY BONDS

(No. 7483—City Comptroller—L. H.—March 8, 1932—3½ pp.)

The Comptroller may deliver to a bank certain interest coupons which have become due on the securities which have been deposited by this bank as collateral for its city depositary bond.

Citations:

Ordinances: Coun. J. (1915-16), p. 2832.

Code '31: 65, 68, 69 (as amended Coun. J. 1931-32, pp. 1575, 1702), 4303.

D. MUNICIPAL DEBT*

State Influence on Municipal Debt: The powers, duties, and liabilities of the city, unless restrained by constitutional limitations, are wholly under the control of the General Assembly and the legislature may compel the city to perform any duty which relates to the general welfare and security of the state, although the performance of the duty will create a debt to be paid by local taxation.—*People v. Chicago*, 351 Ill. 396 (1933).

BASIS OF MUNICIPAL DEBT

(No. 6848—Mayor—C. J. A. and L. B. E.—March 20, 1931—6½ pp.)

Where the legislature accepts less than the full property valuation for taxing purposes, the amount so accepted must be the basis of determining municipal debt limits.

Where the legislature fixes the basis of taxation as well as municipal indebtedness to the full value of the property, the Board of Assessors cannot arbitrarily limit the city's power by taking only a percentage of the full value of the property as a basis for taxation.

The legislature has the power to authorize taxes deferred and paid in installments.

Whether or not there should be a referendum on bond issues is within the discretion of the legislature.

Citations:

Constitution: Illinois, art. IX, sec. 12.

Statute: SH '29, 120: 297 (Revenue act, sec. 18).

Cases: *Western Union Telegraph Co. v. Howe*, 180 Fed. 44 (1910).

Chicago v. Fishburn, 189 Ill. 367 (1901).

City Water Supply Co. v. City of Ottumwa, 120 Fed. 309 (1903).

People v. Chicago and Eastern Indiana R. R., 300 Ill. 467 (1922).

People v. Chicago, 321 Ill. 466 (1926).

*See also Opinion No. 6686, p. 864, on special assessments, and assessment bonds and vouchers as a part of the public debt.

EFFECT OF PARK CONSOLIDATION ON DEBT LIMIT

(No. 6839—*Chairman, Committee on Efficiency, Economy and Rehabilitation—L. H.—February 26, 1931—5½ pp.*)

The adoption of the Park Consolidation act would not extend but rather would curtail the debt incurring power of the city and would result in securing revenues from taxation that would be wholly inadequate to meet the needs of the city.

Citations:

Constitution: Illinois, art. IV, sec. 34.

Id. art. IX, sec. 12.

Statute: Park Consolidation act of June 29, 1915, as amended.

Opinion No. 7437 of February 1, 1932, to the Mayor is in accord with the above opinion.

*(1) Bond Issues***DIVERSION OF PROCEEDS OF BOND**

(No. 8640—*Chairman, Committee on Finance—J. F. G.—January 23, 1935—5 pp.*)

The funds of the city, though raised for a specific purpose, are subject to the control of the state legislature and may be applied to other uses of the city by the legislature, subject only to certain constitutional limitations.

No statutory provision exists for submitting to a vote of the people a transfer or diversion of the proceeds of the sale of bonds authorized by a vote of the people. This diversion can be accomplished only by new legislation. Since the state legislature has complete control over the subject, it may authorize a transfer or diversion of the funds with the consent of the corporate authorities, such consent being given by an ordinance of the City Council with or without the approval of the electors of the city, whichever the statute may provide.

Citations:

Constitution: Illinois, art. IX, sec. 10.

Statutes: SH '33, 24: 661, 662.

Cases: *People v. Power*, 25 Ill. 169 (1860-61).

Cabe v. Sisk, 116 S. E. 419 (N. C., 1923).

City of Reno v. Stoddard, 40 Nev. 537 (1917).

Board of Commissioners v. Lucas, 93 U. S. 108 (1876).

Other references: McQuillin, *Mun. Corp.* (2nd ed.), sec. 727.

Opinion No. 8596 (this volume, p. 753).

OPINION OF FOREGOING SYNOPSIS

By your letter of December 28, 1934, you directed our attention to the fact that there are residues in certain bond funds after payment for all work necessary to complete the projects for which the bonds were issued pursuant to ordinances approved by the electors of the city in accordance with the statute. You requested our opinion to determine whether these funds may be transferred for the construction of other projects similar in character to those contemplated at the time of the bond issues and whether such transfers can be effected by a vote of the electors of the city or by legislative authority without such vote.

In our Opinion No. 5087 to the chairman of the Committee on Harbors, Wharves and Bridges, we answered his request for an opinion as to whether the proceeds of a certain bond issue for the purpose of providing funds for the construction of a bridge in South Halsted street may be transferred to an account for general bridge purposes. Our opinion was based upon the assumption that as a result of reduced cost of labor and materials there would be a salvage in this fund after the completion of the project. We held that the proceeds of this bond issue could not be used for the construction, alteration or maintenance of any other bridge or for any other purpose without the sanction of the state legislature.

The question submitted for our consideration by the chairman of the Committee on Harbors, Wharves and Bridges did not involve a study of the power of the city to transfer the residue in that bond fund by vote of the electors of the city or by further legislative authority. Nevertheless, without citing any adjudicated cases upon the subject, we qualified our opinion upon the power of the city to use the proceeds of that particular bond issue for purposes other than that for which the people voted they should be used by saying that it could not be done "without the sanction of the state legislature." In that opinion there is an undoubted implication that the state legislature may authorize such a transfer.

We had in mind the general principle of law applicable to municipal corporations that they are the creatures of the state having such powers as are granted by the legislative department of the state and that such powers may be enlarged, limited and withdrawn at legislative will. The legislative control extends to the manner of adopting ordinances and exercising the functions of local government. By virtue of this broad power of control over municipal corporations the funds of the city, though raised for a specific public purpose, are subject to the control of the legislature and may be applied to other uses of the municipality, subject to constitutional limitations (*People ex rel. v. Power*, 25 Ill. 169; *Cabe v. Sisk*, (N. C.) 116 S. E. 419; *City of Reno v. Stoddard*, 40 Nev. 537).

The only applicable Illinois constitutional limitation is section 10 of article IX which prohibits the General Assembly from imposing taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes. By virtue of that section of our Constitution the state legislature has no power to apply, or to direct the application of, any part of the bond funds to other purposes than that for which they were authorized to be issued, but there is nothing in our State Constitution which would prevent the legislature from authorizing a diversion of such funds by the corporate authorities of the city. There is nothing in the Constitution of the United States which prevents the state legislature from granting such authority to the corporate authorities of any municipality within the state (*Commissioners, etc. v. Lucas, Treasurer*, 93 U. S. 108, 114).

We assume that the bonds referred to in your communication were issued pursuant to a vote of the electors of the city under the provisions of the act entitled "An Act requiring cities, villages and incorporated towns to submit ordinances authorizing the issue of bonds to the voters of any such city, village or incorporated town, but authorizing the issue of bonds for certain purposes without such submission to the voters," ap-

proved June 4, 1909, as amended (secs. 661, 662, chap. 24, Smith's St. 1933). Section 1 of that act provides that no ordinance authorizing the issue of bonds (except those authorized by specific acts of the General Assembly therein named) shall be valid until such ordinance has been submitted to the voters of the city and approved by a majority of those voting upon the question.

There is no provision for submitting to a vote of the people a transfer or diversion of the proceeds of the sale of bonds authorized by a vote of the people. A municipality cannot submit an ordinance to a vote of the electors without statutory authority (McQuillin Municipal Corporations, 2d ed., sec. 727 and cases therein cited). There is no way by which the result desired may be accomplished except by new legislation. Since the state legislature has complete control over the subject it may authorize a transfer or diversion of the funds with the consent of the corporate authorities by an ordinance of the City Council with or without the approval of the electors of the city. * * *

USE OF BOND FUNDS

(No. 7156—Commissioner of Gas and Electricity—C. J. A.—September 29, 1931—2 pp.)

Lamp-posts purchased with the proceeds of a bond issue for the extension of the municipal lighting system should be devoted strictly to the purpose for which the taxpayers voted to apply the bond issue and not to replace existing lamp-posts.

USE OF BOND FUNDS

(No. 7708—Commissioner of Public Works—I. R.—August 10, 1932—3½ pp.)

As the installation of street lighting facilities is clearly incidental to the construction of the Wabash avenue bridge and viaduct approaches, the cost of such installation may be paid out of the Wabash avenue bridge bond fund.

Citations:

Cases: Chicago v. Norton Milling Co., 196 Ill. 580 (1902).
Chicago v. Pittsburgh, Fort Wayne and Chicago Ry., 247 Ill. 319 (1910-11).

USE OF PROCEEDS OF CERTAIN BRIDGE BOND ISSUE FOR OTHER BRIDGE CONSTRUCTION

(No. 8596—Chairman, Committee on Harbors, Wharves and Bridges—J. F. G.—December 19, 1934—5 pp.)

The proceeds of a bond issue for the purposes of building a certain bridge cannot be used for the construction, alteration or maintenance of any other bridge or for any other purpose without the sanction of

the state legislature, even though a surplus remains after the bridge which was authorized has been completed and all the liabilities therein have been discharged. This surplus should be applied to payment or redemption of the bonds issued for the particular improvement; the tax levy for the payment of principal and interest on these bonds should be reduced accordingly.

Citations:

- Statutes:** SH '33, 24: 661, 662.
Ill. Laws (Sp. sess., 1933-34), p. 123 (Act Concerning Municipal Funds, sec. 1).
Ordinance: Coun. J. (1930-31), p. 3732 (South Halsted St. Bridge ord., sec. 5).
Cases: *People v. Hummel*, 215 Ill. 43 (1905).
Tribune Co. v. Thompson, 342 Ill. 503 (1931).
Gates v. Sweitzer, 347 Ill. 353 (1932).
Other reference: McQuillin, Mun. Corp. (2nd ed.), sec. 2516.

TRANSFER OF SURPLUS BOND FUNDS

(No. 8898—*Commissioner of Public Works*—A. A. S.—October 18, 1935—2 pp.)

The city may not transfer an estimated surplus before the completion of the construction of the State Street Bridge, as the law authorizes the transfer of surplus bond funds only after the payment of all expenses necessary to complete the purpose for which the bonds were issued.

Citations:

- Statute:** Ill. Laws (1935), p. 273.
Ordinance: Coun. J. (1930-31), p. 3729 (North State street bridge construction ord., sec. 6).

EFFECT OF FEDERAL SECURITIES ACT

(No. 8237—*City Comptroller*—L. H.—December 13, 1933—2½ pp.)

The Federal Securities act of 1933 excepts bonds of the city from its provisions.

Citation:

- Statute:** United States Securities act (1933), secs. 2, 3.

SALE OF CITY BONDS IN WHICH CITY FUNDS INVESTED

(No. 7548—*City Comptroller*—L. H.—April 16, 1932—3½ pp.)

The City Council can authorize the sale of city bonds in which the city's aggregate of funds is invested at a price lower than the price at which the bonds were purchased by the city.

The Comptroller is not justified in selling city bonds for less than par, unless the City Council authorizes or directs him to so act.

Citations:

Statute: SH '31, 24: 65, 65.5.

Ordinances: Coun. J. (1931-32), pp. 1037, 1523.

REGISTRATION OF CITY BONDS ON TRUSTEE'S REQUEST

(No. 6798—*City Comptroller—L. H.—November 15, 1930—2 pp.*)

A request to register city bonds coming from a reputable bond house or trust company which is known to act as trustee in such matters accompanied by the bonds to be registered is sufficient authority for the City Comptroller to register the bonds as requested without receiving any request from the owner of them.

FILING CERTIFICATE OF PURCHASES OF REFUNDING BONDS*

(No. 7947—*City Comptroller—L. H.—February 16, 1933—2½ pp.*)

The City Treasurer and City Comptroller may file one certificate each year with the County Clerk immediately prior to the levy of taxes for the principal and interest on refunding bonds, showing the purchases of 1933 refunding bonds since filing the last certificate, rather than filing a certificate for each purchase of refunding bonds.

Citation:

Ordinance: Coun. J. (1932-33), p. 3176.

PRO RATA RETIREMENT OF MATURED BONDS

(No. 7771—*L. H.—October 11, 1932—2 pp.*)

Where the entire issue of matured bonds cannot be retired because of a shortage of funds, payment should be made *pro rata* so that all bonds on a given warrant shall share alike.

Citations:

Statute: Local Improvement act, sec. 43.

Case: Rothschild v. Village of Calumet Park, 262 Ill. App. 96 (1931).

TAX LEVY FOR REDEMPTION OF REFUNDING BONDS

(No. 8272—*City Comptroller—L. H.—January 15, 1934—2 pp.*)

The City Council may require taxes to be extended for maturing bonds and provide that when collected they may be set aside to redeem the refunding bonds that have been issued.

Citation:

Statute: Cities and Villages act, art. V, sec. 5.

*See Opinion No. 7345, p. 743, on the use of the gasoline tax fund for the purchase of refunding bonds.

USE OF SURPLUS BOND LEVY COLLECTIONS TO REDEEM OTHER BONDS

(No. 8412—City Comptroller—L. H.—May 29, 1934—3 pp.)

The surplus amount available out of the bond and interest levy collections for the year 1932 may be used for the purpose of calling refunding bonds of 1934 prior to maturity under the terms of the ordinance providing for the calling of the same before maturity.

Citations:

Ordinances: Coun. J. (1933-34), pp. 1182, 1245 (Refunding of bonds, Bond Redemption Fund).

USE OF TAXES FOR PAYMENT OF FUTURE BONDED DEBT

(No. 8234—City Comptroller—L. H.—December 11, 1933—2½ pp.)

The City Comptroller has no authority to pay off bonds issued in 1934 out of collections of 1931 taxes when the collections do not exceed the amount required for those purposes for which the levy was made.

When there is an excess of collections of bonded indebtedness taxes in any one year, the money not then needed may properly be placed in a separate fund for use in reducing the levies for bonded indebtedness in a subsequent year.

Citation:

Case: *People v. Sandberg*, 277 Ill. 567 (1917).

REFERENDUM ON BOND ISSUE FOR FIRE DEPARTMENT

(No. 6511—Fire Commissioner—J. W. B.—September 17, 1929—2 pp.)

An ordinance authorizing a bond issue for the Fire Department must be passed, become effective and be published at least forty days prior to election day in order to place such bond issue on the ballots.

Unanimous consent is necessary for the passage of an ordinance authorizing a bond issue for the Fire Department when it is reported in by the Finance Committee forty days before the time for election; if such an ordinance is introduced as new matter by an alderman, and the rules are suspended, a two-third vote is then required to pass the ordinance at that time.

*(2) Tax Anticipation Warrants****SEPARATE TAX ANTICIPATION WARRANTS FOR EACH TAXING UNIT**

(No. 7974—City Council—L. H.—March 21, 1933—2½ pp.)

Tax anticipation warrants should be issued separately by each taxing unit and warrants should be accepted by the County Collector in payment only of the particular taxes against which they are issued.

The issuance of unified tax warrants applicable to the entire tax bill could be made possible by the passage of the proper legislation.

Citations:

Statute: SH' 31, 146½: 2.

Ordinance: Coun. J. (1932-33), p. 3424.

LIMITATIONS ON THE AMOUNT OF TAX WARRANTS ISSUED†

(No. 7543—City Comptroller—L. H.—April 14, 1932—3 pp.)

A limitation placed on tax warrants issued against the tax levy for corporate purposes requires that in case there has been a transfer made from the working cash fund to the general corporate fund, the aggregate of both the amount so transferred and the total amount of the tax anticipation warrants drawn against the levy must not exceed ninety per cent of the levy, even though the limit of seventy-five per cent in tax anticipation warrants alone has not been reached.

Citation:

Statute: SH '31, 146½: 2.

DATING OF TAX WARRANTS TO REPLACE INTERIM CERTIFICATES

(No. 8087—City Comptroller—L. H.—June 8, 1933—2 pp.)

Definitive tax warrants issued against the Board of Education's 1933 tax levy to replace interim certificates previously issued should be dated from May 18, 1933, up to and including May 27, since the interim certificates were issued from May 6 to May 18 and the tax warrants could not be issued on the same dates, the tax levy ordinance became effective May 17 and the tax warrants could not be issued until that ordinance became effective, and, the interim certificate ordinance

*See opinions, pp. 740-743, on the investment of public funds in tax warrants.

†See also Opinion No. 7679, p. 742, on the excessive issue of Board of Education tax warrants.

calls for the replacement by tax anticipation warrants within ten days after the passage of 1933 Board of Education tax levy ordinance.

Citations:

Ordinances: Coun. J. (1933-34), pp. 62, 122.

RE-ISSUE OF TAX ANTICIPATION WARRANTS

(No. 7559—*City Comptroller—L. H.—April 30, 1932—3 pp.*)

It would not be proper to re-issue in a new form tax anticipation warrants owned by private parties.

The city may re-issue or replace only those tax anticipation warrants which it has purchased with its own funds, and desires to sell to the public.

SALE OF TAX WARRANTS WHEN INTEREST COUPON BEARS INVALID CLAUSE

(No. 7344—*City Comptroller—L. H.—December 5, 1931—3½ pp.*)

Where certain tax anticipation warrants of the city bear interest coupons which contain an illegal clause providing that the coupon is not receivable for taxes, the Comptroller may resell such warrants without paying any attention to the invalid provision.

Where the tax warrant issued by the city and the interest coupon attached is regarded as one unit, it is entitled to, and subject to, all the rights and limitations given to it as one unit.

Citations:

Statutes: SH '31, 146½: 4-14.

VALIDATION OF TAX ANTICIPATION WARRANTS FOR FIREMEN'S PENSION FUND BY RETIREMENT BOARD

(No. 7089—*Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—August 24, 1931—1½ pp.*)

To validate the issuance and sale of tax anticipation warrants for the purposes of the Firemen's Pension Fund by the president of the Retirement Board of the Firemen's Annuity and Benefit Fund, the board should adopt a resolution ratifying and approving his action.

INTEREST RATE ON TAX ANTICIPATION WARRANTS*

(No. 8262—*City Comptroller—L. H.—January 4, 1934—2 pp.*)

There being an order of the City Council in effect relating to the rate of interest on Firemen's Annuity and Benefit Fund tax antici-

*See Opinion No. 6577, p. 725, on appropriations for interest on tax anticipation warrants and Opinion No. 6507, p. 761, on the payment of interest on tax warrants.

tion warrants of 1933, this order controls the rate until a new order is passed, even though the City Council may accept bank bids which provide for a different rate.

Citation:

Statute: SH '33, 24: 666.

**DISPOSITION OF PROCEEDS FROM SALE OF WARRANTS FOR
FIREMEN'S PENSION FUND**

(No. 7086—*Retirement Board, Firemen's Annuity and Benefit Fund—
G. F. M.—August 22, 1931—4½ pp.*)

Tax anticipation warrants authorized by the City Council to be issued for the purposes of the Firemen's Pension Fund are properly and legally issuable and since the Pension Fund has been superseded by the Annuity and Benefit Fund, the proceeds from the sale of these warrants should be paid into the treasury of the Firemen's Annuity and Benefit Fund.

Citations:

Ordinance: Coun. J. (1930-31), p. 4707.

Statute: Firemen's Annuity and Benefit Fund act, secs. 1, 52.

TAX WARRANTS FOR SCHOOL DEBT

(No. 7591—*City Comptroller—L. H.—June 2, 1932—3 pp.*)

Tax anticipation warrants cannot be issued to meet the bonded indebtedness of the Board of Education.

Citations:

Statute: School act, sec. 132.

Ordinances: Coun. J. (1930-31), pp. 4564, 4706.

Board of Education Tax Warrants: Tax anticipation warrants are payable from the taxes collected and the Board of Education cannot appropriate funds or issue bonds for the payments of such warrants as this would not be for a corporate purpose.—*Berman v. Board of Education*, 360 Ill. 535 (1935).

VALIDITY OF 1931 TAX ANTICIPATION WARRANTS

(No. 7181—*L. H.—October 8, 1931—2 pp.*)

The tax levy for 1931 is in good form and the tax anticipation warrants issued thereon are valid.

**VALIDITY OF 1931 TAX ANTICIPATION WARRANTS—
DEFINITION OF ORDINARY EXPENSES**

(No. 7596—*City Comptroller—L. H.—June 6, 1932—3 pp.*)

Tax anticipation warrants drawn against the tax levies of 1931 for the bond redemption and interest fund, for library purposes, and for the Municipal Tuberculosis Sanitarium are valid since they do not

exceed the statutory limitation as to amount, are duly authorized, and are drawn in the proper form.

The phrase "ordinary expenses" of the city means any expense that occurs with regularity and certainty, or expenses and debts which mature during the current fiscal year.

Citations:

Cases: *Brown v. City of Corry*, 175 Pa. St. 528 (1896),
State v. Leaphart, 11 S. C. 458 (1878).

ISSUANCE OF ADDITIONAL 1931 TAX WARRANTS

(No. 7583—City Comptroller—L. H.—May 23, 1932—1½ pp.)

It is proper to issue additional tax warrants against the general corporate levy of 1931.

TAX ANTICIPATION WARRANTS AS SALARY PAYMENTS

(No. 6594—City Comptroller—R. N. L.—January 29, 1930—4 pp.)

The City Council has the right to order the issuance of tax anticipation warrants.

The City Comptroller and the City Treasurer may sell tax anticipation warrants to city employees who desire to accept them instead of cash for services payable from the corporate fund of the city.

City employees who accept tax anticipation warrants in place of cash payment of their salary are in the same position as any other purchaser of tax anticipation warrants.

Citations:

Statutes: Cah. '29, 146(a): 1, 2, 3 (Warrants for Public Money).

Cases: *Law v. People*, 87 Ill. 399 (1877-78).

City of Springfield v. Edwards, 84 Ill. 626 (1876-1877).

PAYMENT AND REDEMPTION OF TAX ANTICIPATION WARRANTS

(No. 6599—Mayor—J. W. B.—February 7, 1930—1 p.)

The City Comptroller may serve written notice on the holder of any tax anticipation warrant requesting its presentation for payment, and if the warrant is not presented within a reasonable time, he may order the interest on it to cease.

The City Comptroller may issue tax anticipation warrants payable at any date that he may see fit to fix in the warrants.

The warrants shall be payable solely out of the taxes against which they have been drawn.

PAYMENT OF INTEREST ON TAX WARRANTS BY TAXES AND SINKING FUND*

(No. 6507—City Comptroller—L. H.—September 12, 1929—4 pp.)

Neither the sinking fund for the payment of bonds, nor the sinking fund for payment of bond interest may be drawn on for payment of interest on tax anticipation warrants.

Where a sinking fund for bonds is derived from a tax levy made for a particular purpose, the sinking fund must be used for that purpose.

The failure to make a proper appropriation for the payment of interest on tax anticipation warrants does not take away the rights of the holders to the interest.

Citations:

Statutes: Cities and Villages act, art. VIII, sec. 4.
Act of 1913 concerning warrants, sec. 3.

Case: City of Cairo v. Campbell, 116 Ill. 305 (1886).

PAYING TAX WARRANTS FROM TAX LEVIED FOR THAT PURPOSE†

(No. 6792—City Comptroller—L. H.—October 29, 1930—2½ pp.)

The principal and interest on all tax anticipation warrants issued against the various levies for sinking funds for the payment of bonds and interest on bonded indebtedness must be paid from the taxes that are extended and collected on account of these levies.

Citation:

Statutes: Cah. '27, 146a: 2, 3.

REDEMPTION OF TAX WARRANTS

(No. 6886—City Comptroller—L. H.—May 1, 1931—4½ pp.)

The city can give a preference to tax warrants held by outside parties instead of to those held by the City Treasurer.

Money may be transferred to a trust company in another city to act as city agent for the redemption of warrants.

Citation:

Statute: SH '29, 24: 666.

*See also Opinion No. 8262, p. 758.

†See also Opinion No. 7930, p. 715.

REDEMPTION OF TAX WARRANTS SOLD ON A "TRUE DISCOUNT BASIS"

(No. 6927—*City Comptroller—L. H.—June 3, 1931—4 pp.*)

When tax anticipation warrants have been sold by the city on a "true discount basis," that being the customary basis, it is lawful for the city to redeem those warrants on the same basis, even though the warrants themselves do not indicate this procedure.

Citation:

Case: *McGovern v. Chicago*, 281 Ill. 264 (1918).

COUNTY TAX WARRANTS AS PAYMENT OF COUNTY DEBT TO CITY

(No. 8264—*City Comptroller—L. H.—January 5, 1934—2 pp.*)

The City Council may accept tax anticipation warrants of Cook County in liquidation of a debt of that county.

SET OFF OF TAX WARRANTS AGAINST CITY'S DEPOSITS

(No. 7147—*M. H. F.—September 25, 1931—2½ pp.*)

Tax anticipation warrants held by a bank in receivership may not be set off against the city's deposit therein.

*(3) Warrants and Vouchers**

PAYMENTS ON AND LEGAL TITLE TO CITY WARRANTS

(No. 6701—*City Comptroller—C. J. A.—June 30, 1930—10 pp.*)

A bank does not immediately obtain legal title to municipal warrants deposited with it but obtains legal title only to such an amount as it pays on the warrants. When no payments have been made on the warrants, neither the bank nor its receiver can collect on the warrants from the city.

The city, at the request of the payee, can stop payment on water fund warrants deposited in an insolvent bank, as the legal title to the warrants still remains in the payee.

Municipal warrants, pay checks, or other orders drawn by one

*See Opinion No. 7454, p. 740, and Opinion No. 9183, p. 123, on withholding payment of voucher claims.

municipal officer upon another officer of the same municipality are not negotiable instruments.

Citations:

- Cases: *People v. Johnson*, 100 Ill. 537 (1881).
Morrison v. Austin State Bank, 213 Ill. 472 (1904-05).
Northern Trust Co. v. Village of Wilmette, 200 Ill. 417 (1902-03).
Mayor v. Ray, 86 U. S. 468 (1873).
Miner v. Vedder, 66 Mich. 101 (1887).
First National Bank v. Gates, 66 Kan. 505 (1903).
Other references: *Dillon, Mun. Corp.* (5th ed.), sec. 856.
Op. Corp. Counsel (1915-16), p. 4.

WARRANTS IN EXCESS OF ORDINANCE PROVISION— ADVANCE SALARY PAYMENTS

(No. 8097—*City Comptroller—L. H.—June 22, 1933—5½ pp.*)

When the Comptroller draws checks on warrants for sums aggregating more than the amount specified by ordinance for the advance payments of regularly appropriated salaries, he does so without authority.

Section 1 of the General Warrants act, which prohibits the drawing of warrants unless there is "sufficient money in the appropriate fund in the treasury to pay said warrants," is violated when the total amount of pre-issued pay checks in the hands of the City Treasurer is so large that should the Treasurer liquidate the pay checks and should a pay roll warrant be put through there would not be enough money on hand in the fund involved to meet the warrant.

Citations:

- Statutes: *Cities and Villages act*, art. VII, secs. 5, 11.
SH '31, 146½: 1.
Ordinances: Code '31: 129.
Coun. J. (1931-32), p. 822.

SETTLEMENT OF CLAIM BY VOUCHER—INTEREST ON CLAIMS AGAINST CITY

(No. 6836—*City Comptroller—C. J. A.—February 16, 1931—5½ pp.*)

Where a voucher of the city is issued and accepted in full settlement of all claims, no further claim, whether for accrued interest or otherwise, can be allowed.

The city in the absence of express agreement is not chargeable with

interest on claims against it, unless the money has been wrongfully obtained and illegally withheld by it.

Citations:

Statutes: SH '29, ch. 74.

Id. 24: 794.

Cases:

Ostrander v. Scott, 161 Ill. 339 (1896).

City of Pekin v. Reynolds, 31 Ill. 529 (1863).

Merchants Trust Co. v. Chicago, 264 Ill. 76 (1914).

Chicago v. People, 56 Ill. 327 (1869-70).

South Park Commissioners v. Dunlevy, 91 Ill. 49 (1878-79).

Vider v. Chicago, 164 Ill. 354 (1896-97).

City of Danville, v. Danville Water Co., 180 Ill. 235 (1899).

County of Coles v. Goehring, 209 Ill. 142 (1904).

Other references: 6 McQuillin Mun. Corp. (2nd ed.), sec. 2635.

Op. Corp. Counsel (1916-19), p. 782.

INTEREST ON WITHHELD VOUCHER

(No. 7042—*City Comptroller—L. H.—July 31, 1931—2 pp.*)

Where the issuance of a voucher is withheld, the individual is entitled to interest on the amount of the voucher from the date the voucher should have been issued until the date it was issued and the money for payment of the voucher was available in the city treasury.

INTEREST ON WITHHELD VOUCHERS—"FULL SETTLEMENT" STIPULATION

(No. 7013—*City Comptroller—L. H.—July 15, 1931—5 pp.*)

Where vouchers for contracted services under the Local Improvement act are withheld because the amount was in dispute, the city should pay interest on the amount allowed as the principal sum due from the date that the vouchers should have been issued to the date the money was available for these vouchers in the city treasury.

Where extra allowances to a contractor are not compromise payments but additional compensation under the terms of the contract a stipulation that such voucher is issued in full payment of all claims would have no legal effect.

Citations:

Statute: Local Improvement act, sec. 88.

Other reference: Op. Corp. Counsel (1916-19), p. 783.

FEDERAL TAX ON VOUCHERS OF MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND

(No. 7667—*City Treasurer—G. F. M.—July 27, 1932—1 p.*)

As vouchers issued by the Municipal Employees' Annuity and Benefit Fund are orders for the payment of money drawn upon the City

Treasurer, they are not subject to the federal two cent tax on checks, drafts or orders for payment of money drawn upon any bank, banker or trust company.

Opinions No. 7634 of July 5, 1932, to the Retirement Board, Policemen's Annuity and Benefit Fund, No. 7633 of July 5, 1932, to the Retirement Board, Firemen's Annuity and Benefit Fund, and No. 7630 of July 1, 1932, to the Retirement Board, Municipal Employees' Annuity and Benefit Fund, are all in accord with the above opinion.

(4) Judgments Against the City

ORDER OF PAYMENT OF JUDGMENTS PRIOR TO 1930

(No. 8661—J. F. G.—February 1, 1935—1 p.)

Judgments rendered against the city prior to January 1, 1930, and payable out of a special judgment tax, must be paid in the order of their entry.

Citation:

Ordinance: Code '31: 88.

Opinion No. 8771 of May 16, 1935 is in accord with the above opinion.

ORDER OF PAYMENT OF JUDGMENTS PRIOR TO 1930

(No. 8646—J. F. G.—January 24, 1935—1 p.)

The city cannot pay a judgment which was rendered prior to January 1, 1930, and which is payable out of the judgment tax fund, until all judgments, together with interest, entered prior to it, have been paid in full.

Citation:

Statute: Ill. Laws (Sp. sess., 1933-34), p. 122 (Judgments).

ORDER OF PAYMENT OF JUDGMENTS

(No. 8831—City Comptroller—J. F. G.—July 26, 1935—2 pp.)

Except where a court has issued a mandamus to compel the payment of a judgment, the judgment should be paid out of the judgment tax fund in its order of entry and interest on judgments should be paid ratably.

Citation:

Case: People v. Kelly, 361 Ill. 50 (1935).

Opinion No. 8971 of December 17, 1935 is in accord with the above opinion.

Judgment Payments: Section 88 of the Revised Code of 1931 requiring judgments against the city to be paid in the order of the date of entry is valid.—People v. Kelly, 279 Ill. App. 22 (1935).

PAYMENT OF JUDGMENTS TO OTHER THAN CREDITOR

(No. 8035—*City Comptroller—L. H.—April 27, 1933—2 pp.*)

When payment on a judgment is made the Comptroller should make sure that the person receiving the payment is the creditor or his authorized agent.

A certified copy of the transcript of a judgment is not a negotiable instrument and loss of it by the creditor does not deprive him of his right to be paid.

A person, who presents for payment a certified copy of the transcript of a judgment, when he is not the judgment creditor or his agent, is perpetrating a fraud.

Citation:

Ordinance: Code '31: 88.

ORDER OF PAYMENT OF JUDGMENTS OUT OF SPECIAL FUNDS

(No. 8647—*Comptroller—J. F. G.—January 25, 1935—2½ pp.*)

A judgment rendered against the city in regard to work and materials for river-straightening may be met in part by paying out the total of the residue that is left in the river-straightening bond issue fund after all the other obligations of the river-straightening project have been paid. The rule that judgments shall be paid in the order of entry regardless of what time, before January 1, 1930, they were obtained does not apply to a case where there is a special fund which is legally available for that purpose and which cannot be used for the payment of other judgments.

Citations:

Statute: Ill. Laws (Sp. sess., 1933-34), p. 122.

Case: City of East St. Louis v. Underwood, 105 Ill. 308 (1882-83).

PAYMENT OF CURRENT JUDGMENTS

(No. 8136—*City Comptroller—L. H.—August 3, 1933—2½ pp.*)

All judgments entered by the court in a particular year should be paid out of the appropriation for the payment of judgments for that year until the appropriation is exhausted and any unpaid judgments must await a new appropriation before they can be paid.

PAYMENT OF ASSIGNED OR SOLD JUDGMENT

(No. 8501—*City Comptroller—J. J. S.—September 7, 1934—2½ pp.*)

A conveyance of an interest in a judgment is usually executed by an assignment using the words "assign, transfer, and set over," but any words which show an intent of the owner to part with his interest are sufficient.

Before paying a judgment against the city upon a bill of sale where

the seller and witness to the sale are dead, the City Comptroller should require the purchaser to hand over the paid bills for the funeral of the seller and to execute an affidavit, in order to foreclose any action which might be taken in the Probate Court with reference to the judgment to collect funeral expenses or debt.

Citations:

Cases: Colehour v. Bass, 143 Ill. App. 530 (1909).

Steingrebe v. French Mirror and Glass Beveling Co., 83 Ill. App. 587 (1899).

Savage v. Gregg, 150 Ill. 161 (1910).

Other references: 1 Bouvier's Law Dictionary (Rawle's 3rd rev.), 264, "assignments."
5 CJ 897.

PROCEDURE OF ASSIGNING CITY JUDGMENT BY CHURCH

(No. 6717—Comptroller—C. J. A.—July 15, 1930—3½ pp.)

A notary cannot supply the missing authority when the person signing the document fails to specify in what capacity he signs.

An assignment by a church of a judgment obtained against the city should be accompanied by a resolution passed by the church as a body or by its board of trustees authorizing such assignment.

E. CLAIMS FOR AND AGAINST THE CITY

(1) *Claims of the City**

PRIORITY OF CITY CLAIMS AGAINST BANKRUPT†

(No. 8164—Comptroller—C. N.—September 1, 1933—5½ pp.)

The claims of the United States, the states and municipalities against bankrupts should be paid out before all others and the ruling of a referee limiting the time for filing *general* claims does not affect the validity of a municipal claim.

The city is entitled to a priority for the payment of license fees from the estate of a bankrupt, and it should not accept in lieu thereof a stock certificate against the estate.

Citations:

Statute: USCA, Title II, sec. 104.

Cases: People v. Irving Trust Co., 22 Am. Bank. Rep. (n.s.) 286 (1933).

In re Smith and Co., 1 Am. Bank. Rep. (n.s.) 119 (1923).

In re Green River Jockey Club, 6 Am. Bank. Rep. (n.s.) 249 (1925).

In re West Coast Rubber Corp., 2 Am. Bank. Rep. (n.s.) 452 (1923).

(The original opinion of the foregoing synopsis is reproduced on the following pages.)

*See also Opinion No. 8447, p. 123, on the release of securities held for a debt to the city.

†See also Opinion No. 8753, p. 714.

OPINION OF FOREGOING SYNOPSIS

We have your communication of August 10, 1933, enclosing stock certificate for one share at \$1.00 par value, issued to the City of Chicago in satisfaction of its claim against the Company, bankrupt.

You ask for advice as to whether it would be in the best interest of the city to accept the certificate and cancel the outstanding warrants for collection, or if we are in a position to suggest some legal means for safeguarding the city's interest in full.

The warrants for collection represent amounts due the city for miscellaneous license fees covering street signs, ventilators, etc., all of which items were owned by the Company.

Section 104, Title II, bankruptcy, of the United States Code Annotated, entitled: "Debts which have priority" (a), reads as follows:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipt of the proper public officers for such payment, he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court."

"What taxes included, meaning of word 'tax.' The word 'tax,' as used in the Bankruptcy act, is not used in any restricted or narrow sense, but is used broadly to include all obligations imposed by the state and general government under their respective taxing or police powers for governmental or public purposes. That a tax so imposed may not be a general property tax does not deprive it of the character of a tax. Many taxes are imposed under the name of license fees, franchise taxes, or taxes for special purposes under some other name, and are therefore special taxes; but they are nevertheless taxes imposed for a public purpose, no matter what the name under which they are levied or imposed, and are clearly within the meaning of the term 'tax,' as used in the Bankruptcy act." (In re Otto F. Lange Co., United States District Court of Iowa, 1908; 159 F. 586, 20 American Bankruptcy Reports, 478.)"

A study of the bankruptcy records in the case of the Company, shows that the original petition was filed before the referee in July, 1932. The final date for filing claims has passed, this date being fixed by statute at six months after adjudication. The bankrupt performed his legal duty of scheduling the amount due the city and giving notice as to pending proceedings.

These records also show that certain interests, now calling themselves the Company, acquired the good will and assets of the bankrupt for a consideration of \$501,000.00. It is these interests who are offering the city a certificate of one dollar doubtful par value in satisfaction of its license claim for \$131.70. The referee is now disbursing a 15 per cent dividend in which the city does not participate for technical reasons, in re the formal filing of claims.

That the claim of a municipality comprises something more than even an ordinary preferred claim is revealed not only in the bankruptcy act itself, which makes it mandatory upon the trustee to pay this type of claim before all others, but in the fact that this is repeatedly recognized in numerous bankruptcy cases in all sections of the country. We give you herein some excerpts from cases that involved this point in order that you may see that there is ample judicial authority for the course of action we suggest.

In the matter of Louis K. Liggett Co., Bankrupt, United States District Court, southern district of New York, the petition of the trustees for an

order limiting the time for filing claims by states, counties, and municipalities, sets forth in paragraph 3:

"Your petitioners are advised and believe that the provisions of the Bankruptcy Act limiting the time for filing of claims do not apply to claims asserted by the States, counties or municipalities."

In the case of the People of the State of New York, Petitioner v. Irving Trust Company, Trustee in Bankruptcy of the Experimenter Publishing Company, as reported in the American Bankruptcy Reports (new series), Volume 22, page 286, the United States Supreme Court in February, 1933, recognized this feature of municipal accounts and held that tax bar orders are binding on states and other municipalities, but nowhere does the United States Supreme Court, or any other court, recognize an order barring tax claims by inference. * * *

It is clear that it is the sense of the Bankruptcy act that legitimate claims of the United States, the states and municipalities should be paid out before all others and that the ruling of a referee limiting the time for filing general claims in no way affects the validity of a municipal claim.

The United States District Court of Florida in the matter of Smith & Company, as reported in Volume 1 of the American Bankruptcy Reports (new series), page 119, said:

"A claim for taxes is legally due and must be paid before dividends are distributed to creditors, although the tax collector might have collected the same by levy and sale prior to the bankruptcy."

The District Court of Kentucky, in the matter of Green River Jockey Club, as reported in Volume 6 (new series) page 3920, of the same authority, said:

"A claim for taxes is entitled to preference over general creditors, regardless of whether tax asserted is made by law which imposes it a lien on bankrupt's property or not."

The United States Circuit Court of Appeals, ninth circuit, in the matter of West Coast Rubber Corporation, as reported in Volume 2 of the American Bankruptcy Reports (new series), page 452, said:

"Claims for taxes are entitled to priority of payment over wage claims."

It is apparent that the scheduling of the city's claims by the bankrupt comprise notice to the trustee. That the trustee was fully aware of the city's claim is also apparent from the fact that the purchasers of the assets and good will of the bankrupt communicated with the city in regard to its claim.

We are of the opinion that for you to accept the certificate offered and exchange a clearly recognized preferred claim for an inadequate speculative account, the value of which cannot be definitely decided, would indicate a failure to take advantage of the preference accorded by law and might be construed as a lack of vigilance to protect the city's interests.

It is our advice that you return the certificate to the Company, and that at the same time you make a demand upon the trustee for payment in full of the city's license claim. * * *

* * * * *

Opinion No. 8587 of December 11, 1934, to the Comptroller discusses the same point as the above opinion.

FILING CLAIM AGAINST BANK RECEIVER, EFFECT ON SURETY—RETURN OF DISHONORED CHECK

(No. 7072—*City Comptroller—L. H.—August 13, 1931—2 pp.*)

Filing proof of claim with a bank receiver by the Comptroller does not endanger the city's claim against sureties.

The Comptroller should not return a check which has been dishonored to the receiver of the bank when the receiver has not given anything for it.

PREFERENCE OF MUNICIPAL FUNDS IN CLOSED BANK

(No. 7342—*Secretary, Board of Directors, Chicago Public Library—M. H. F.—December 4, 1931—1 p.*)

The Chicago Public Library funds in a closed state bank are not considered as preferred claims, since such a preference is based on the idea of sovereignty, which applies to the state itself but does not apply to the funds of a municipality or any other agencies of the state.

Citations:

- Cases: People v. Farmers State Bank, 338 Ill. 134 (1930).
People v. Farmers State Bank, 335 Ill. 617 (1929).
People v. Bank of Chebanse, 340 Ill. 124 (1931).
People v. Home State Bank of Grant Park, 338 Ill. 179 (1930).

PRIORITY OF DEPARTMENTAL PETTY CASH FUNDS UPON BANK INSOLVENCY

(No. 7677—*President, Board of Health—M. H. F.—July 30, 1932—2 pp.*)

As the mere fact that a depositor makes a deposit in a fiduciary rather than an individual capacity does not make such deposit a special one entitled to priority in case of the bank's insolvency, it is doubtful whether a trust relation exists so as to give priority to the petty cash funds of a municipal department, as the Board of Health, which was deposited in the name and person of an employee of that department.

Citation:

- Case: People v. Farmers State and Savings Bank, 338 Ill. 134 (1930).

CANCELLATION OF OLD WARRANTS DUE

(No. 8006—*Chairman, Committee on Finance—M. F. M.—April 8, 1933—2 pp.*)

Warrants for money due the city against which the Statute of Limitations has run should be cancelled.

Citations:

Statutes: SH '31, 83: 16, 17.

OBLIGATION TO PRESENT CHECK FOR PAYMENT*

(No. 7453—*M. F. M.—February 17, 1932—1 p.*)

When a check, drawn on a bank in the same city is received, it is the duty of the payee, in this case Chicago, to present it for payment within a reasonable time.

PRESENTATION OF CHECKS FOR PAYMENT*

(No. 7864—*City Comptroller—M. F. M.—December 28, 1932—1½ pp.*)

When checks issued to the City Comptroller against warrants for collection were not presented for payment within a reasonable time and the bank has closed, the warrants for collection against which they apply should be withdrawn.

It is the duty of a person to present a check for payment within a reasonable time.

**LIABILITY WHEN CASHIER'S CHECK RETURNED BY
INSOLVENT BANK**

(No. 6837—*City Collector—L. H.—February 19, 1931—3 pp.*)

A party who tenders a cashier's check in payment of a fee of the city is not relieved of the liability for this debt, when the check is returned because of the closing of the bank, if the city has exercised due diligence in presenting the check for payment.

Citations:

Ordinance: Code '22: 79.

Statute: Negotiable Instruments, act, sec. 185.

Opinion No. 8279 of January 20, 1934, to the City Comptroller deals with the same subject.

*See also Opinion No. 7139, p. 805.

LIABILITY FOR LOSS DUE TO DELAY IN DEPOSITING CHECK

(No. 7900—*City Comptroller—C. J. A.—January 13, 1933—4½ pp.*)

Where the city received a check in part payment and delivered a receipt reciting that the "money" was held on condition that the balance would be paid within sixty days, the city is liable for the loss occasioned by the delay in presenting it for payment, even though the condition was not performed because at the time the receipt for "money" was given, the check was good. If the receipt had stated that the "check" and not the "money" was held conditionally, the city would not be liable for the loss.

A person who receives a check must deposit the same without delay or become responsible for any loss occasioned by the delay.

Citations:

Statute: SH '31, 98: 207 (Negotiable Instruments act, sec. 185).

Case: First National Bank of Kewanee v. Wine, 255 Ill. App. 578, 582 (1929-30).

Other references: Opinion No. 7845 (this volume, p. 716).

Opinion No. 7864 (this volume, p. 771).

EFFECT OF BLANKET RELEASE FOR DAMAGE

(No. 7872—*M. F. M.—January 3, 1933—1½ pp.*)

A blanket release by the city for any damage claims it may have against another party prevents the city from subsequently instituting any claims in connection with such damage.

Citation:

Case: Clancy v. McBride, 338 Ill. 35 (1930).

SET OFF AGAINST CLAIM OF CITY*

(No. 7274—*City Comptroller—R. N.—November 9, 1931—1½ pp.*)

A claim of the city against a person for goods which the person denies receiving is a claim of an unliquidated amount which cannot be set off against a liquidated claim by this person against the city.

RECOVERY ON ERRONEOUS CHECK

(No. 6885—*Acting Comptroller—L. H.—May 1, 1931—1½ pp.*)

The city, through a civil suit, can recover from an individual the amount of a check erroneously made out to and cashed by him; the action of the person, however, does not violate the criminal code nor any city ordinance.

*See Opinion No. 6872, p. 773.

JUDGMENT FOR CITY AGAINST COMPANY IN RECEIVERSHIP

(No. 6958—*Chairman, Committee on Finance—C. J. A.—June 17, 1931—6 pp.*)

A judgment obtained by the city against a corporation after the appointment of a receiver, in an action commenced before such appointment, would bind only the company and not the receiver of its assets or the purchaser of the assets in a foreclosure sale.

Citations:

Cases: Chicago v. Oak Park Elevated R. R., 261 Ill. 478 (1913-14).

Evans v. Illinois Surety Co., 319 Ill. 105 (1926).

Other reference: 1 Clark, Receivers, sec. 685.

(2) *Claims Against the City**

CONFLICTING CLAIMS TO MONEY DUE FROM CITY

(No. 6951—*City Comptroller—L. H.—June 13, 1931—2½ pp.*)

Where various parties lay claim to a sum of money due from the city, the city should file a bill of interpleader and thus have a court of competent jurisdiction pass on the questions involved and adjudicate the rights of the parties.

**CLAIM FOR PAYMENT TO NON-OWNER OF SUPPLIES
PURCHASED**

(No. 7302—*City Comptroller—L. H.—November 17, 1931—3 pp.*)

Where a commodity, flour, is delivered to the city by a company and a claim is made by another party, as owner of the commodity, for payment after the city has already paid the delivering company, unless the party claimant has, by its actions, indicated that the delivery company was its agent or principal in the transaction, the city will have no defense against this claim.

SET OFF OF CLAIM AGAINST DEBT

(No. 6872—*Acting Comptroller—C. J. A.—April 23, 1931—1½ pp.*)

Money due from the city to a person can be withheld until a claim of the city against this person is adjusted.

The city cannot withhold money that it owes to one person and apply it to the debt of a second person to the city just because the first person is indebted to the second person.

*See Opinion No. 6836, p. 763, on interest on claims against the city and pp. 121, 122 for other opinions on claims against the city.

PAYMENT ON LOST CITY SECURITIES

(No. 6950—*City Comptroller*—L. H.—June 12, 1931—2½ pp.)

When a claim is made against the city on the basis of lost or stolen securities issued by the city, the city should protect itself before satisfying this claim by requiring a bond from the claimant under the provisions of state law.

Citation:

Statute: SH '31, 98: 15.

ISSUANCE OF DUPLICATE PENSION CHECK

(No. 7216—*City Comptroller*—L. H.—October 26, 1931—2½ pp.)

Where a pension check has been lost and the pensioner desires the city to issue a duplicate check, he should make proof of his loss in the manner provided by statute and after judgment has been rendered thereon against the city, a bond of double the amount of the check may be required by the court. The Comptroller should not issue a duplicate check to replace the lost check unless such procedure is followed.

Citation:

Statute: SH '31, 98: 15.

REVOCATION OF POWER OF ATTORNEY TO RECEIVE CHECKS

(No. 7245—*Retirement Board, Municipal Employees' Annuity and Benefit Fund*—G. F. M.—November 2, 1931—1½ pp.)

A power of attorney to receive and endorse a check can be revoked at any time before the check is delivered where the instrument does not disclose a consideration for its execution and a statement that it is irrevocable; and in the latter case, it can be revoked where fraud was perpetrated in obtaining its execution.

Citation:

Case: Guthrie v. Wabash Railroad, 40 Ill. 109 (1863-66).

ASSIGNMENT OF ATTORNEY'S LIEN

(No. 6564—*Acting Deputy Comptroller*—W. W.—December 11, 1929—2 pp.)

The City Comptroller must recognize the assignment by an attorney of his lien for fees when the relation between the attorney and his client, by which those fees were earned, is terminated. If this relation is not terminated, the lien is not assignable without the consent of the client.

CONFLICTING ASSIGNMENTS OF MONIES DUE FROM CITY

(No. 8384—*City Comptroller—O. W. H.—May 11, 1934—1½ pp.*)

Where the city has been notified "to withhold the payment of any future monies" to a creditor or his assignees, the city should not recognize a further assignment of the creditor dated subsequent to such notice; parties in dispute should settle their differences by agreement or otherwise, and the person who previously notified the city should furnish written indication that such agreement has been reached.

The city should resort to filing a bill of interpleader in court to determine who is entitled to certain monies only after all other methods have failed.

REVOCATION OF ASSIGNMENT OF MONIES

(No. 7288—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G. F. M.—November 12, 1931—2 pp.*)

An assignment of monies due from a city agency may be revoked if it does not disclose a consideration for its execution and a statement that it is irrevocable, but even where it contains a statement of irrevocability it can be revoked where fraud was perpetrated in obtaining its execution.

Citations:

- Cases: Bell v. Felt, 205 Ill. 213 (1903).
Guthrie v. Wabash R. R., 40 Ill. 109 (1863-66).

REFUNDS WHEN JUDGMENTS VACATED*

(No. 6548—*Chairman, Committee on Finance—J. L.—November 20, 1929—2 pp.*)

The vacation of a judgment entitles the party to a refund of the money paid under that judgment.

In the case of a claim for a judgment paid and vacated by the court, the Statute of Limitations begins to run at the time of the payment of the judgment and runs for five years.

Citations:

- Cases: Claves v. White, 83 Ill. 540 (1876).
Roth v. Chicago, 207 Ill. App. 117, 121 (1918).

*See also Opinion No. 8061, p. 362, on the refund of fines.

PAYMENTS TO A SURVIVING PARTNER

(No. 7890—City Comptroller—A. F. G.—January 7, 1933—1 p.)

Death dissolves a partnership, and the City Comptroller, if satisfied that the surviving partner has become the owner of all the assets of the dissolved partnership, may add such person's name as surviving partner to a check for a refund due to the partnership.

CHAPTER XII

MANAGEMENT OF CITY PROPERTY

INTRODUCTORY

The total property holdings of the city in real estate, buildings, equipment and improvements, were valued, as of January 1, 1936, at over \$262,000,000. In addition the city occupies various properties as a tenant or leaseholder. These municipal holdings include a city hall, police stations, firehouses, hospitals, baths, parks, incinerating plants, bathing beaches, playgrounds, pumping stations, laboratories, garages, and a host of other properties.

The management of these municipal assets is entrusted to two major departments, finance and public works. The former is concerned with financial management, with the purchase, sale or disposition of property holdings and with the execution and custody of mortgages or leases, while the Department of Public Works is responsible for construction and maintenance and also, through the Bureau of Water, for the management of the water supply system of the city. In 1932 there was created a separate bureau in the Department of Public Works to attend to building maintenance and repair.

The water works is a separate and distinct holding of the city supplying a public utility service, water, to the city and neighboring communities. It constitutes 147 of the 262 million dollars worth of city property. The city owns almost 4,000 miles of cast iron water mains networking the entire city and the daily pumpage of the system within the city alone is close to 370 million gallons.

The legal problems confronted in the management of the water works cover a wider area than those encountered in the control of other city properties. In addition to tenancy rights, lease interpretations, landlord's obligations, property encroachments and the like, one must consider under water service such matters as the supply of service, the adequacy of service, rates and refunds.

The municipal airport, as a recently acquired and important holding of the city, is worthy of special note. It was first put into operation in December of 1927 and in 1935 there were over 40,000 airplane arrivals at the field. Sixteen hangars and several other buildings are located on its approximately 300 acres. Seven major airlines operate over 100 schedules there daily. It is today one of the major air transport terminals of the country.

A. CITY'S REAL PROPERTY*

(1) *General Management*

ENCROACHMENTS UPON CITY PROPERTY

(No. 7631—*City Architect—E. R. D.—July 1, 1932—2 pp.*)

A contractor for the city has no right to trespass on other people's property to remove eaves encroaching upon city property.

Citation:

Case: *Harniance v. Vernoy*, 6 Johns (N. Y.) 5 (1810).

USE OF CITY BUILDINGS FOR NON-MUNICIPAL PURPOSES— PARK DISTRICT POLLING PLACE

(No. 6703—*Attorney for Old Portage Park District—C. J. A.—July 2, 1930—8 pp.*)

The city may charge for the use of its fire engine house by a park district as a polling place.

A municipality may permit the incidental use of its buildings for other than municipal purposes with or without compensation, so long as that use does not inconvenience or interfere with their ordinary municipal use.

Citations:

Cases: *Worden v. New Bedford*, 131 Mass. 23 (1881).

French v. Quincy, 85 Mass. 9 (1861).

City of St. Louis v. The Maggle P., 25 Fed. 202 (1885-86).

Other references: 44 CJ 1092.

Dillon, *Mun. Corp.* (5th ed.), sec. 997.

MOVABLE STRUCTURES PLACED ON CITY PROPERTY

(No. 8431—*Commissioner of Public Works—C. N.—June 12, 1934—2 pp.*)

Wheels, casters, and other ambulatory devices attached to property imply that it is in the nature of personal property and thus does not belong to the city when placed on city property unless specific provision is made to that effect with the owner.

Citation:

Reference: Opinion No. 8282 (this volume, p. 783).

*See Opinion No. 6662, p. 116, on the superintendence of public grounds and the erection of buildings on them, Opinion No. 6408, p. 117, on the custodianship of city property, and Opinion No. 7893, p. 57, on the sale of city property.

EXCAVATIONS NEXT TO CITY PROPERTY

(No. 6521—*Commissioner of Public Works*—W. W.—October 8, 1929—3 pp.)

Persons erecting a building have the right to take the lateral support from the adjoining city property, if they are not negligent or careless in the excavating, and if they notify the city, so as to give it time to protect its property from a possible cave-in.

Citations:

- Cases:** Starr v. Tilton Co., 183 Ill. App. 454 (1914).
Noceto v. Weill, 166 Ill. App. 162 (1912).
Chicago v. Quincy, 76 Ill. 231, 241 (1875).
Best Co. v. Peoria Co., 226 Ill. App. 60 (1922).

Opinion No. 6508 of September 13, 1929, to the Deputy Superintendent of Streets is in accord with the above opinion.

WRECKING OF CITY BUILDINGS BY COMMISSIONER OF PUBLIC WORKS

(No. 8658—*Deputy Acting for the Mayor, Department of Buildings*—A. F. G.—February 1, 1935—2½ pp.)

Where the Department of Public Works demolishes old buildings for the Board of Education, receives all the salvage as compensation, and uses this salvage in constructing necessary buildings for the city at about one-half of the estimated cost (all the labor being furnished by the Illinois Emergency Relief Commission and the supervision being supplied by the Bureau of Engineering of the Department of Public Works), the Commissioner of Public Works acts within his authority. The general ordinance applicable to wreckers does not apply since all the parties are public agencies and the resulting benefits to the taxpayers are quite large. Hence, no wrecking bond is required to be delivered to the Department of Buildings by the Commissioner of Public Works.

Citation:

Ordinance: Code '31: 1197(b).

REMOVAL OF ELEVATED SPUR TRACK ON CITY PROPERTY

(No. 8697—*City Comptroller*—J. J. S.—March 7, 1935—5 pp.)

Since there has been an abandonment of the Lawrence avenue pumping station, the city can remove so much of the elevated spur

track as is on city property, and is obligated to remove all of the track if its use is discontinued.

Citations:

Ordinances: Coun. J. (1916-17), p. 2793.

Id. (1930-31), p. 4227.

Other reference: Opinion No. 7886 (this volume, p. 61).

Plant Nursery: The city has implied power to maintain on its property a nursery to supply its parks and public grounds with trees and shrubs and the City Council may exercise such power by resolution, without a formal ordinance.— *People v. Chicago*, 363 Ill. 409 (1936).

Tax Exemption of City Property: Judgment and order of sale of Gage farm, a nursery in Berwyn owned by the city for municipal purposes, for the 1931 delinquent taxes of Berwyn was denied under the statute exempting all property owned by a city outside of its boundaries when used as a nursery for municipal purposes.— *People v. Chicago*, 363 Ill. 409 (1936).

(2) *City as Lessor.*

**LICENSE AND INSPECTION FEE EXEMPTIONS UNDER LEASE
FROM CITY**

(No. 7014—*Commissioner of Public Works—C. J. A.—July 15, 1931—5 pp.*)

A mere lease of space in public property by the city does not authorize the lessee to sell anything without a proper license, but a grant of the privilege to sell certain commodities does exempt the grantee from paying any occupational license fees other than the fees specified in the grant.

The city may contract with a concessionaire on city property to accept a concession fee in lieu of all other inspection and license fees.

Citation:

Ordinance: Coun. J. (1929-30), p. 519.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of recent date, inquiring whether * * * Enterprises, concessionaire of restaurant and other privileges at the Municipal Pier, under a contract authorized by the City Council, is required to pay, in addition to the concession fee fixed by its contract, license fees for the privilege of selling the articles mentioned in such contract.

Your inquiry calls for an interpretation of the contract of * * * Enterprises with the city, with special reference to whether the same is to be understood as being a mere *lease of space* on the pier or a grant of the privilege to sell the articles specified. A mere lease of space would not authorize the lessee to sell anything without a proper license, while a grant of the privilege to sell would, in our opinion, exempt the grantee from paying any occupational license fees other than the stipulated concession fee.

* * * * *

In our opinion, this contract is not primarily a *lease of space* on the pier, but a *grant of the privilege to sell* certain specified articles there. It is true that the word "lease" (which is commonly used in reference to real estate) is employed, but no particular space is named or described in the contract. Not even the amount of space that the concessionaire may use is stated. On the other hand, the contract is very specific as to what the concessionaire may sell.

Having by this contract been granted the privilege to sell the articles specified, the concessionaire is not, in our opinion, required to obtain and pay for any additional permits or licenses for the same purpose. The theory of a license fee in ordinary cases is that it is intended to reimburse the city for the trouble and expense of inspection. Under the contract in question, however, all such inspection and supervision is placed in the hands of the Commissioner of Public Works, thus taking it out of the hands of the officials who ordinarily perform such duties in connection with licenses and permits. This would seem to indicate that the City Council did not contemplate that the concessionaire should be subject to ordinary inspections and license fees.

A concessionaire on public property owned by the city occupies a different position from a person in private business on private premises, and we know of no reason therefore why the City Council can not, if it so sees fit, lawfully enter into a special contract with him, whereby he is to pay a substantial concession fee in lieu of all other inspection and license fees. And we believe that is the legal effect of the contract entered into in this case.

Viewed from the standpoint of business policy, it is questionable whether the city would gain anything in the long run by imposing license fees, in addition to concession fees, upon concessionaires of privileges on public property. For it stands to reason that if a person bidding for a concession knows that he will have to pay license fees in addition to his concession fees, he would be apt to make his bid for the concession just so much less. The result would be that the city would get no more money but would only have the trouble and expense of collecting several smaller fees instead of one larger one.

For the reasons above stated we are of the opinion that, under its contract with the city, the * * * Enterprises is not liable to pay any license fees for its concessions on the Municipal Pier, other than the concession fees fixed by the contract.

* * * * *

ACCEPTANCE RECEIVER'S CERTIFICATES FOR RENT

(No. 6884—*Chairman, Committee on Finance—C. J. A.—May 1, 1931*
—2½ pp.)

Where a lease by the city calls for payment in money, the city has the right to refuse receiver's certificates in lieu of money.

The City Council has the power, in the exercise of its business judgment, to accept receiver's certificates in lieu of money for the payment of debts to the city.

Citations:

Ordinance: Coun. J. (1930-31), p. 4835.

Cases: Meed v. Chicago and Northwestern Ry., 189 Ill. App. 323 (1915).

Agnew v. Brall, 124 Ill. 312 (1888).

Town of Petersburg v. Mappin, 14 Ill. 193 (1852-53).

Chicago v. Pennsylvania, Cincinnati, Chicago and St. Louis Ry., 244 Ill. 220 (1910).

Ludlow Valve Manufacturing Co. v. Chicago, 181 Ill. App. 388 (1913).

Other reference: 48 CJ 629.

ASSIGNMENT OF LEASE FROM CITY—GREY GOOSE AIR LINES

(No. 6793—*City Comptroller—R. N. L.—October 29, 1930—3 pp.*)

Where the city has granted a lease containing a covenant against the assigning of it, the city may refuse to accept a new tenant who claims by right of assignment.

By the terms of the lease by Chicago to the Grey Goose Air Lines, March 27, 1928, and of the assignment of this lease to Chicago Air Service, February 6, 1930, the Comptroller may refuse to accept a new tenant by assignment.

Citation:

Case: Smith v. Goodman, 149 Ill. 75 (1893-94).

LESSEE'S FAILURE TO PAY TAXES AS AGREED

(No. 7852—*City Comptroller—O. W. H.—December 23, 1932—1 p.*)

The city has a right to terminate a lease of its property for failure to pay taxes when the lease provided that the lessee was to pay taxes and special assessments.

REGAINING OR REPAIRING BUILDING LEASED TO PRIVATE PARTY

(No. 7301—*Commissioner of Public Works—L. H.—November 17, 1931—2½ pp.*)

The possession of the Criminal Court buildings which have been leased to a private party cannot be secured except by following the statutory procedure prescribed in the case of forceable entry and detainer. Where changes or improvements are to be made in these buildings, notice should be given to the occupants.

TITLE TO CONCESSION STRUCTURES ON CITY PROPERTY

(No. 8282—*City Comptroller—C. N.—January 24, 1934—2½ pp.*)

Where the specifications and proposal of the Department of Public Works for a certain concession provide that the concession structures erected upon city property revert to the city, if the concessionaire should for any reason cease to operate the concession, such structures are not conveyed away by the concessionaire when, after ceasing to operate, he gives a quitclaim deed to some third person.

LEASING SPACE ON NAVY PIER

(No. 8021—*City Comptroller—L. H.—April 19, 1933—3 pp.*)

Navy Pier is a structure which comes within the provisions of the State Harbor act.

To lease space at the Navy Pier, the City Council should pass an ordinance authorizing the lease, and when the lease has been entered into, the approval of the Illinois Director of Purchases and Construction should be obtained.

Citations:

Statute: SH '31, 24: 600(a).

Ordinances: Code '31: 77, 2855.

LEASING SPACE ON NAVY PIER—COMPETITIVE BIDDING

(No. 6439—*Commissioner of Public Works—J. W. B.—May 29, 1929—2½ pp.*)

Leasing of space on Navy Pier does not have to be accomplished through competitive bidding. However, the lease must contain such terms and conditions as shall be prescribed by the ordinance which

the City Council must pass in accordance with the Cities and Villages act.

Citation:

Statute: SH '27, 24: 600.

SUB-LETTING SPACE ON NAVY PIER

(No. 7989—City Comptroller—C. N.—April 1, 1933—2 pp.)

A properly executed lease for space at Navy Pier, which allows for sub-letting with the responsibility of paying rent remaining in the original lessee, cannot be cancelled by the original lessee.

Citation:

Ordinance: Coun. J. (1932-33), p. 2507.

TIME EXTENT OF NAVY PIER CONCESSION

(No. 7863—City Comptroller—L. H.—December 28, 1932—4 pp.)

The ordinance of July 14, 1929, concerning a contract for concessions on Navy Pier contemplates a full period of four years and not merely the summer seasons.

Citation:

Ordinance: Coun. J. (1929-30), p. 519.

REMOVAL OF LAND IMPROVEMENT BY CHICAGO MEADOWS GOLF CLUB

(No. 8917—City Comptroller—O. W. H.—November 8, 1935—1½ pp.)

Under the terms of its lease, the Chicago Meadows Golf Club can not remove underground piping, wiring, buildings, or any of the sod which has been placed upon the premises leased to them by the City of Chicago without the written authority of the city.

(3) Damage to City Property

DAMAGE DUE TO LAKE LEVEL RISE—CONSEQUENTIAL DAMAGES

(No. 6608—Commissioner of Public Works—J. L. and E. C. H.—February 28, 1930—4 pp.)

Damage to the city and its citizens by the high level of Lake Michigan, if attributed to the artificially increased water discharge from Lake Superior into Lake Michigan by the locks at Sault Ste.

Marie is consequential damage, and in order to recover that damage all the elements entering into the cause of action must be established by clear and convincing proof.

Citations:

Statutes: SH '29, 19: 52, 54, 60, 70, 72, 73.

Case: Watson v. Sutherland, 72 U. S. 74, 79 (1866).

Other reference: 1 Bouvier's Law Dictionary (Rawle's 3rd ed.), 752.

OPINION OF FOREGOING SYNOPSIS

From a report of a committee of five engineers made to you on December 3, 1929 on another matter it appears that said committee attributes the "unprecedented" rise in the levels of Lake Michigan to a "combination of natural causes * * * aggravated by artificial increase in discharge of water from Lake Superior through the controlling works at Sault Ste. Marie."

According to this report the discharge of water from Lake Superior "was so manipulated as to aggravate the high water situation prevailing on Lake Michigan, and that this manipulation is partially responsible for the excessive damages resulting from storms."

You say that "further investigation disclosed the fact that a flow of 100,000 cubic feet of water per second from Lake Superior aggravated the rise of lake levels to a height unprecedented for the past sixty years, and that not only was the rise of the lake influenced but also the lowering of the lake was influenced by this cause."

You ask as to whether the City of Chicago has any ground for damages against the parties responsible for the loss suffered by Chicago and its citizens.

The St. Mary's river forms the outlet of Lake Superior, connecting it with Lake Huron. From Whitefish Bay, at Point Iroquois and Gros Cap, the river flows in a general southeasterly direction to Lake Huron at Detour, a distance of from sixty-three to seventy-five miles. Lake Huron is a connecting link in the chain of the Great Lakes, which receives the waters of Lake Michigan through the Straits of Mackinac, and those of Lake Superior by way of the St. Mary's river. The distance on water between Port of Sault Ste. Marie and the City of Chicago is about 414 miles.

The damages which the City of Chicago and its citizens are claimed to have suffered are known in law as consequential damages as distinguished from damages which are direct. It is well settled that consequential damages are rarely recoverable in cases of this character. (Watson v. Sutherland (1866), 72 U. S. (5 Wall.) 74, 79; 1 Bouv. Law Dic. (Rawle's 3d ed.) 752). However, in order to recover, all the elements entering into a cause of action of this sort must be established by clear and convincing proof.

Assuming that damages were actually incurred by the City of Chicago and its citizens by reason of the lowering of the locks on St. Marys river which resulted in an unusual and extraordinary rise of the waters in Lake Michigan—a fact which we are reliably informed would take about a year's careful and thorough investigation by engineers to establish—we lack facts showing who the parties were that caused the damage and under what color of right or authority they had acted. If these parties had acted in pursuance of governmental authority, then what government was it, the Canadian or the United States Government, or both? If these parties had acted on their own authority, then we should know that fact before considering or determining liability. In other words, it makes a substantial difference who the party is and by what authority he acts in a matter of this kind.

Not having these facts and it clearly being necessary to make a thorough

investigation of the matter before a right decision could be reached, we suggest that the Director of the Department of Purchases and Construction at Springfield be requested to take such action as he deems proper in the premises.

The Department of Purchases and Construction, the successor to the old River and Lakes Commission, by virtue of the statute, has "jurisdiction and supervision over all of the rivers and lakes of the State of Illinois, wherein the State of Illinois or the people of the State of Illinois have any rights or interests." Pars. 52, 54, 73, chap. 19, Smith's Stat. 1929.

Said department by another provision of the statute is required "to make a careful investigation of each and every body of water, both river and lake, in the State of Illinois, and to ascertain to what extent, if at all, the same have been encroached upon by private interests or individuals, and wherever they believe that the same have been so encroached upon, to commence appropriate action." Par. 60, chap. 19, *Ibidem*.

Still another provision of the statute makes it the duty of said department "to maintain stream gauge stations, and to make careful investigations of the streams of the state with reference to the carrying capacity of all such streams in times of flood and under normal conditions." Par. 70, chap. 19, *Ibidem*.

The power to represent the Department of Purchases and Construction, in the name and by authority of the State of Illinois, is by another provision of the statute conferred upon the Attorney General of the state, or any state's attorney or an attorney appointed by said department. Par. 72, chap. 19, *Ibidem*.

* * * * *

DAMAGE TO CITY PROPERTY—PROSECUTION FOR RECKLESS DRIVING

(No. 7120—Acting Commissioner of Police—O. W. H.—September 12, 1931—1 p.)

No ordinance makes damage by persons to stop and go lights or no-parking signs a misdemeanor, but such persons might be prosecuted for reckless driving or disorderly conduct.

LIABILITY FOR DAMAGE TO CITY PROPERTY WHEN AVOIDING INJURY TO CHILD

(No. 8295—Chairman, Committee on Finance—E. L. M.—February 9, 1934—1½ pp.)

The undisputed assertion of the driver of an automobile that damage to city property was the sole alternative to the taking of a child's life would probably be a successful defense to an action by the city to collect for this damage.

LIABILITY FOR DAMAGE TO CITY PROPERTY IF CAR NOT DRIVEN BY OWNER

(No. 6943—*Chairman, Committee on Finance—F. J. B.—June 11, 1931—1½ pp.*)

In the absence of a master-servant relation, the owner of a car is not liable for damage caused to city property by another while driving the car, even though he may have consented to its use by the other.

Citations:

Cases: Nelson v. Stutz Chicago Factory Branch, 341 Ill. 387 (1931).
Arkin v. Page, 287 Ill. 420 (1919).
White v. Seitz, 342 Ill. 266 (1931).

STOLEN AUTOMOBILE—OWNER'S RESPONSIBILITY FOR DAMAGES

(No. 6607—*Commissioner of Gas and Electricity—H. M. S.—February 25, 1930—1½ pp.*)

The owner of a stolen car that damaged city property is not responsible for the damage, as it was not caused by his negligence or the negligence of someone for whose acts he is legally answerable.

Citation:

Statute: Motor Vehicle act, sec. 31.

B. CITY AS TENANT

TAX EXEMPTION OF LAND LEASED TO CITY

(No. 8143—*Mayor—W. L. S.—August 15, 1933—3 pp.*)

Property leased to the city by a charitable institution for the purpose of a public park, playground or commons cannot be exempted from taxation, as there is no statute consistent with the Illinois Constitution requiring a general law by which it can be so exempted.

Citations:

Constitution: Illinois, art. IX, sec. 3.
Statute: Revenue act, sec. 2, cl. 9.
Cases: People v. Chicago, 323 Ill. 68 (1927).
People v. Passavant Hospital, 342 Ill. 193 (1931).

(The original opinion of the foregoing synopsis is reproduced on the following pages.)

OPINION OF FOREGOING SYNOPSIS

You recently asked to be advised if the City of Chicago were to lease from an eye and ear infirmary certain unimproved property owned by the latter, such vacant property to be leased for a definite period of years for the purpose of a public park, public playground or public commons, would the vacant property so leased to the city be exempt from taxation.

A few years ago, the City of Chicago leased for a definite term of years four parcels of property for public playgrounds in the city. By the terms of the leases the city was to pay one dollar per year and assume and pay the taxes during the terms of the leases. Taxes were levied against the playgrounds and the city filed objections. The city contended in the courts that the property in question was exempt from taxation under the ninth clause, among others, of section 2 of the Revenue act, which provides that the following property shall be exempt from taxation: "all market houses, public squares or other public grounds used exclusively for public purposes; all works, machinery and fixtures belonging exclusively to any town, village or city."

Our Supreme Court, however, sustained the county court in overruling the city's objections as to the assessment of the four playgrounds in the *People ex rel. v. City of Chicago*, 323 Ill. 68, on the ground that the exemption of property from taxation is governed primarily by section 3 of article 9 of the Illinois Constitution of 1870, which is in part as follows: "The property of the state, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law * * *."

The Constitution divides property which may be exempted by legislation into two classes; that owned by the state, counties or municipal corporations, and that used exclusively for the purposes specified in the last clause of that section.

Neither can it be successfully contended that the proposed park, playground, commons, or whatever it may be termed, will be exempt from taxation because the property is owned by a charitable organization, and we are assuming that the eye and ear infirmary is a charitable organization.

In *The People ex rel. v. Passavant Hospital*, 342 Ill. 193, the court said at page 196:

"If property is devoted primarily to charitable purposes it is exempt notwithstanding there is an incidental use for another purpose, but an incidental use for charitable purposes while the primary use is for another purpose will not warrant exemption. To be exempt from taxation on the ground that it is devoted to charitable purposes property must be in actual use by an institution of public charity in carrying out directly its charitable purposes. Property of an institution of public charity is not exempt from taxation where it is not in actual use directly for such purposes but is leased or otherwise used with a view to profit or income from the property even though such income or profit is applied exclusively to maintain such charitable institution, as the primary use in such case is for profit and the application of the income is secondary."

Statutes exempting property from taxation must be strictly construed, and there is no provision in our statutes consistent with the Constitution of the state by which property leased by the city to be used for the purposes indicated can be exempted from taxation.

* * * * *

INTEREST ON OVERDUE RENT

(No. 8117—City Comptroller—M. H. F.—July 14, 1933—2½ pp.)

Where a lease to the city does not provide for interest payments on past due or deferred rental installments, the city need not pay interest on the same.

Where a lease to the city expressly provides for interest payments on past due or deferred rental installments, the city must pay interest thereon unless it can show that, at the time of final payment and settlement of the rent between the parties, the final payment was accepted as full satisfaction of the entire account.

CITY'S RENTAL PAYMENTS ON PROPERTY IN RECEIVERSHIP

(No. 7835—City Comptroller—G. T.—December 13, 1932—1 p.)

No rent for leased premises should be paid to the receiver of the lessor bank by the city where the bank is now in the hands of a receiver and no court order directs the receiver to indorse checks for the period in question.

CITY'S FAILURE TO VACATE PREMISES

(No. 6669—City Comptroller—R. N. L.—May 13, 1930—2½ pp.)

When the city notifies the owner of premises which it is occupying that it will quit those premises at the expiration of its lease, and then does not do so, the owner has the right to demand double the rent which would otherwise have been due for the time the city continues to hold the premises.

Citation:

Statute: SH '29, 80: 3 (par. 3).

EJECTMENT AGAINST CITY

(No. 7432—City Comptroller—L. H.—January 28, 1932—2½ pp.)

In the case of ejectment proceedings against the city as tenant, the city could probably tie up the case through tax claims against the property, long enough to consummate condemnation proceedings against the property.

If the city initiates condemnation proceedings, it will probably be able to protect its own tax claims but it must also protect the claims of the other tax buyers who have tax deeds.

Citation:

Statute: Revenue act, secs. 224, 225.

LIABILITY FOR THEFT OF RENTED PROPERTY

(No. 6895—*Commissioner of Public Works—C. J. A.—May 7, 1931—*
2½ pp.)

The city is not liable for the theft of property that is rented by the city, unless it has failed to exercise reasonable care or has assumed the position of an insurer.

Citations:

- Cases: *Standard Brewery Co. v. Bemis*, 171 Ill. 602 (1897-98).
Cloyd v. Steeger, 139 Ill. 41 (1891-92).
Gunde v. Spraner, 198 Ill. App. 584 (1917).
Johnson v. Chicago Feather Co., 172 Ill. App. 81 (1913).
Other reference: 6 CJ 1121.

OBLIGATION FOR COST OF REPAIRS

(No. 8248—*City Comptroller—E. L. M.—December 19, 1933—3 pp.*)

Where the city, in its lease of a building, covenants to repair generally the leased building, it is obliged to bear the cost of all repairs except those from causes specifically excluded in the lease, notwithstanding any inevitable accident.

Citations:

- Cases: *Hacken v. Isenberg*, 288 Ill. 589 (1919).
Steele v. Buck, 61 Ill. 343 (1871).

C. CITY'S WATER SYSTEM*(1) General Administration****USE OF LAKE MICHIGAN WATER**

(No. 6731—*Commissioner of Public Works—J. L.—July 25, 1930—*
3½ pp.)

The federal government has placed no restriction whatever on the use of Lake Michigan water for domestic purposes by the people of Chicago.

Citations:

- Case: *Wisconsin v. Illinois*, 281 U. S. 179 (1930).
Other reference: 16 Op. Corp. Counsel 350.

(The original opinion of the foregoing synopsis is reproduced on the following pages.)

*See Opinion No. 6484, p. 720, on appropriations from the water fund, Opinion No. 6542, p. 739, on expenditures from the water fund for the construction of sewers, Opinion No. 7434, p. 742, on expenditures from the water fund for teachers' salaries, and Opinion No. 7489, p. 741, on the investment of the water fund in tax anticipation warrants.

OPINION OF FOREGOING SYNOPSIS

Answering your verbal request as to what effect the recent Rivers and Harbors bill passed by Congress has or will have upon the rights of the people of Chicago as to the free and unrestricted use of the waters of Lake Michigan for domestic purposes, we wish to say that we have made a careful study of an act entitled "An act authorizing the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," approved July 3, 1930, known as the "Rivers and Harbors Bill," and find nothing in said bill or any portion thereof which in any way alters the opinion of the Corporation Counsel under date of November 4, 1927, which reads in part as follows:

"The People of the states of Illinois, Indiana, Michigan and Wisconsin, as riparian owners, have the right to use the water of Lake Michigan for drinking and other domestic purposes subject only to the rights of the Federal Government to regulate commerce among the several states and with foreign nations with reference to navigable water." C. C. Ops. 1928, p. 350.

The pertinent part of the Rivers and Harbors Bill provides:

"That the water authorized at Lockport, Illinois, by the decree of the Supreme Court of the United States, rendered April 21, 1930 * * * is hereby authorized to be used for the navigation of said waterway: Provided further, that as soon as practicable after the Illinois waterway shall have been completed in accordance with this Act, the Secretary of War shall cause a study of the amount of water that will be required as an annual average flow to meet the needs of a commercially useful waterway as defined in said Senate document, and shall, on or before January 31, 1938, report to the Congress the results of such study with his recommendations as to the minimum amount of such flow that will be required annually to meet the needs of such waterway and that will not substantially injure the existing navigation of the Great Lakes to the end that Congress may take such action as it may deem advisable." Public Document No. 520, 71st Congress, 2nd Session, p. 13.

The above provision, it will be seen, makes no reference to or restrictions upon the use of water for any purpose except navigation.

We do not have before us the decree rendered by the Supreme Court on April 21, 1930, and referred to in the excerpt from the Rivers and Harbors Bill, but we do have the opinion handed down by the Supreme Court of the United States on April 14, 1930 (*Wisconsin v. Illinois*, 281 U. S. 179), which was the basis for said decree of April 21.

Said opinion appears to have nothing to do with the use of the waters of Lake Michigan for domestic purposes but has to do with the diversion from Lake Michigan of 8,500 or more of cubic feet per second into the Chicago drainage canal for the purpose of diluting and carrying away the sewage of Chicago. Indirectly, the opinion recognizes the right of the people of Chicago to use the waters of Lake Michigan by basing the gradual diminution of the diversion of the waters from Lake Michigan upon a certain number of cubic feet "in addition to what is drawn for domestic purposes" or "in addition to domestic pumpage." In other words, the withdrawal from or diversion of the waters of Lake Michigan is by the opinion and decree made subject to and not dependent upon or controlled by the use of waters of Lake Michigan for domestic purposes.

We conclude, therefore, as above, that no restriction whatever has been places by either the opinion or the decree or the Rivers and Harbors Bill upon the use of the waters of Lake Michigan for domestic purposes by the people of Chicago.

* * * * *

DEDICATION OF WATER FUND PROPERTY AS HIGHWAY

(No. 6485—*Commissioner of Public Works—J. W. B.—August 5, 1929—4 pp.*)

The Commissioner of Public Works, in the absence of authority from the City Council, has no power to dedicate any water fund property as a public highway; such authority should be in the form of an ordinance and would be drawn so as to protect the interests of the water fund and the rights of the city.

COLLECTION AND HANDLING OF WATER RATES

(No. 8885—*Commissioner of Public Works—E. L. M.—September 26, 1935—4 pp.*)

The Superintendent of the Bureau of Water is an officer of the city who receives money by virtue of his office. Being authorized by ordinance to collect all water rates or assessments and to pay these over each day to the City Treasurer, he is bound to make additional monthly accounts or reports to the City Treasurer and the City Council as required by the statute concerning the receipt of public money.

The Commissioner of Public Works should countersign and approve the monthly reports of the Superintendent of Water.

Citations:

Statutes: ISBS '35, 102: 13, 14.

ACCOUNTING SYSTEM OF BUREAU OF WATER

(No. 6667—*Superintendent, Bureau of Water—W. W.—May 19, 1930—2½ pp.*)

The use by the Bureau of Water of loose-leaf accounting books is permissible if the accounts are kept in conformity with the regulations concerning public records. The loose-leaf system must keep the accounts as safely and properly as the old-fashioned ledger books.

RENEWING CONTRACT FOR SUBSTANDARD WATER

(No. 7446—*Commissioner of Public Works—Jud. G.—February 10, 1932—3½ pp.*)

To continue the contract entered into by the city with the Atlas Brewing Company thirty years ago to supply the brewing company with water from the Blue Island avenue tunnel would require a special ordinance since the contract would authorize the city as a

private water company to sell substandard water, the purity standards of the city water having risen during the past thirty years.

Citations:

Ordinances: Code '31: 2976, 4101.

PRESSURE REQUIREMENTS IN WATER SUPPLY

(No. 8486—Alderman, 13th Ward—J. A. S.—August 6, 1934—2 pp.)

The city, in supplying water, contracts to deliver water from its mains to connecting pipes of adjacent property at the current pressure.

The city does not guarantee that water of sufficient pressure will be supplied to any apartment regardless of elevation.

A landlord is under no obligation to install a pump to maintain suitable pressure as far as he and any governmental agency are concerned.

PURCHASE AND HANDLING CHLORINE GAS

(No. 7210—Commissioner of Police—F. J. B.—October 23, 1931—3 pp.)

The city may purchase and handle chlorine gas for water purification in containers of one ton capacity. In view of the dangerous nature of the gas and its tendency to escape, such care must be exercised by the city in storing and handling the gas as is consistent with the dangers which it is the duty of the city to avoid.

Citations:

Ordinance: Code '31: 2787.

Cases: Rockford Gas Light and Coke Co. v. Ernst, 68 Ill. App. 300 (1896).

Baudler v. Peoples Gas Light and Coke Co., 108 Ill. App. 187 (1903).

Lehigh Valley Railway v. Allied Machinery Co., 271 Fed. 900 (1921).

Other references: 45 CJ 689.

56 ICC Reports, appendix 2.

WATER SERVICE WHEN USE AS CEMETERY BEING LITIGATED

(No. 7549—Commissioner of Public Works—C. J. A.—April 16, 1932—1½ pp.)

Where one is the owner of property, he has the right to make some use of the premises, even though it cannot be used for burial purposes. Hence, the city should not deny to a cemetery company a permit to install water service simply because litigation is pending against the company as to its right to use the premises for cemetery purposes.

*(2) Construction and Maintenance****CONSTRUCTION OF WATERWORKS BEYOND CITY LIMITS**

(No. 6718—*Commissioner of Public Works—C. J. A.—July 16, 1930—2 pp.*)

The city is authorized by statute to construct waterworks beyond the city limits.

Citations:

Statutes: Cities and Villages act, art. X, sec. 2.
SH '29, 24: 429.

RELOCATING WATER MAINS TO LAY SEWER MAINS

(No. 6689—*Commissioner of Public Works—C. J. A.—June 3, 1930—6½ pp.*)

The cost of removing and relocating water mains to make way for the construction of sewers may be charged against the water fund.

In the construction and operation of water works, the city is acting in a corporate capacity and like any private business, the water works bureau can be required to move its property at its own expense whenever the city, in the exercise of a governmental function, such as the construction of sewers, shall determine that it needs that portion of the street for governmental function.

Citations:

Cases: *Wagner v. City of Rock Island*, 146 Ill. 139 (1892-93).
New Orleans Gas Light Co. v. Drainage Commission, 197 U. S. 453 (1905).
Appeal of Brumm, 12 Atl. 55 (Pa., 1888).
City of Litchfield v. Litchfield Water Supply Co., 95 Ill. App. 647 (1901).
Chicago v. Selz, Schwab and Co., 104 Ill. 376 (1882).
Holmes v. Chicago, 203 Ill. 445 (1903).
National Waterworks Co. v. City of Kansas, 28 Fed. 921 (1886).
Jamaica Pond Aqueduct Co. v. Brookline, 121 Mass. 5 (1876).

COST OF LAYING PIPES ON PRIVATE PROPERTY

(No. 7524—*Chairman, Committee on Finance—Jud. G.—March 31, 1932—3 pp.*)

The city is not liable for the cost of installing water pipe where the claimant company laid it on its own property and for its own use, but the claim may properly be allowed to the extent of the cost of a connection between the main in the street and the abutting private property, since the city ordinarily pays for such a direct connection.

*See Opinion No. 8324, p. 636, on the construction of water pipe extensions in streets occupied by public utilities.

SURETY FOR PLUMBING WORK ABOUT CITY WATER OR SEWAGE SYSTEM

(No. 7895—President, Board of Health—B. J. K.—January 12, 1933—3 pp.)

Every licensed plumber who makes any alterations or repairs or does any work in or about any pipe or pipes connected with any part of the city water works system or with any pipe or sewer connected within the city sewer system must have a bond in the sum of \$10,000 with sureties to be approved by the Commissioner of Public Works.

Such surety bond must be furnished before the city approves any plumbing work done on any pipe or pipes connected with any part of the city water works system, whether they be located on private or public property.

Citation:

Ordinance: Code '31: 3596.

LAYING WATER MAINS FOR FIRE PURPOSES

(No. 7797—Commissioner of Public Works—O. W. H.—November 3, 1932—1½ pp.)

Section 4075 of the Revised Chicago Code does not apply to the laying of water mains for "fire purposes".

Citation:

Ordinance: Code '31: 4075.

(3) Liability for Water Charges

LIABILITY FOR WATER CHARGES—PAYMENT UNDER PROTEST

(No. 7574—C. J. A.—May 13, 1932—4 pp.)

The charge by the city for water is not a tax nor a lien upon property, but is a charge for service and is collectible only from those parties to whom the service has been rendered, or from those who have contracted for the service either expressly or by implication. A property owner who has neither contracted for, nor received water service is not liable for water charges, even though the service was rendered to his tenant.

When an ordinance expressly states that the property owner named in it is liable for water furnished to his premises and the ordinance is duly published, he is liable for the charges for the water furnished. The publication of the ordinance constitutes notice to him, and if he

permits water service on his premises without notifying the city that he will not be responsible for the charges, he has impliedly agreed to pay for the service.

If a threat is made without just cause to shut off water, the property owner may pay under protest and then sue to recover the money so paid.

Citations:

Statute: SH '31, 24: 132.

Ordinance: Code '31: 4072.

Cases: Chicago v. Northwestern Mutual Life Insurance Co., 218 Ill. 40 (1905).

People v. Schlitz, 266 Ill. 22 (1915).

Other reference: Op. Corp. Counsel (1911-12), p. 559.

LIABILITY FOR WATER CHARGES

(No. 8173—*Commissioner of Public Works—E. L. M.—September 12, 1933—1½ pp.*)

A person cannot be charged for water supplied to property during the time that he was neither owner, tenant nor occupant of such property and had no control over the property or its occupants at the time in question.

Citation:

Case: Chicago v. Northwestern Mutual Insurance Co., 218 Ill. 40 (1905).

PURCHASER'S LIABILITY FOR PRIOR WATER CHARGES— WATER CHARGES AS A LIEN

(No. 8287—*Commissioner of Public Works—J. A. S.—January 30, 1934—2 pp.*)

A charge for the use of city water is not a tax but a matter of contract and cannot be assessed against a subsequent purchaser who has had no notice of the delinquent charge against the former owner or tenant.

While the city could, through ordinance, perfect a lien for water charges, it has not complied with the necessary requirements of the statute that allows this lien.

Citations:

Statute: Cah. '31, 24: 1065.

Case: Rockford Saving and Loan Association v. Chicago, 352 Ill. 348 (1933).

OPINION OF FOREGOING SYNOPSIS

We attach hereto a copy of a letter received from the law firm of * * * concerning water charges on property.

The above mentioned letter sets out that title was taken to the premises on December 11, 1933, and that the bureau of water of the City of

Chicago had billed for water which was used by the former owner and further that the bureau of water threatens to shut off the water supply unless the delinquent charges are paid. In addition the letter claims that the city cannot assess a charge for water incurred by a previous owner against a subsequent purchaser without notice and in this connection cites the case of Rockford Saving and Loan Association v. City of Chicago, reported in 352 Ill. Sup., page 348. The writer claims that the court held that the charge for use of city water is not a tax but is contractual and that it cannot be assessed against a subsequent purchaser who has no notice of the delinquent charge against the former owner or tenant. Further the letter states that the water bureau was informed of the attitude of the said purchaser.

After full consideration of the statements contained in the above mentioned letter, we are of the opinion that the conclusion stated is correct legally. The decision of the Illinois Supreme Court (Rockford Loan Association v. City of Rockford, 352 Ill. 348) alluded to is controlling as to the facts alleged.

Our reason for so stating may be said to be as follows: The lien for water charges conferred by section 4 of the act of 1873 authorizing cities, villages and incorporated towns to construct and maintain water works (Cahill's Statutes 1931, par. 1065, page 628) is ineffectual unless the city council of the municipality involved adopts by ordinance a means of perfecting the said lien. Thus far the City of Chicago has not complied with the above legal requirements.

* * * * *

Opinion No. 8277 of January 19, 1934, to the Chairman of the Committee on Finance is in accord with the above opinion.

WATER CHARGES INCURRED BY A PREVIOUS OWNER OF PREMISES

(No. 8752—Commissioner of Public Works—J. A. S.—April 23, 1935—1½ pp.)

When water charges were legally incurred by a previous owner other than the present owner of a premises, and when a supporting affidavit has been filed, the charges should be transferred to the suspense account or collected from the previous owner.

Opinion No. 8520 of October 10, 1934, to the Commissioner of Public Works is in accord with the above opinion.

AFFIDAVIT DENYING LIABILITY FOR WATER CHARGES

(No. 8803—Commissioner of Public Works—J. A. S.—June 25, 1935—4½ pp.)

If the affidavit and proof satisfy the Superintendent of the Bureau of Water that the person is not liable for water charges which ac-

crued prior to the date he took possession of property, the Superintendent of the Bureau of Water may transfer the prior charges to the suspense account and attempt collection from the persons liable for them. This procedure should be followed whether the property is under assessed rates or under meter control.

An affidavit seeking to avoid water charges may be required to be amplified so as to show, if possible, who is liable for the charges.

Citation:

Ordinance: Code '31: 4129.

DELINQUENT WATER CHARGES AND CHANGE OF OWNERSHIP OF PREMISES

(No. 8552—*Commissioner of Public Works—J. A. S.—November 7, 1934—1½ pp.*)

Section 4129 of the City Code concerning the change of ownership of premises where delinquent water charges exist is valid and operative.

Citation:

Ordinance: Code '31: 4129.

Opinion No. 8554 of November 8, 1934, to the Commissioner of Public Works is in accord with the above opinion.

DELINQUENT WATER CHARGES AND CHANGE OF TENANCY PREMISES

(No. 8546—*Commissioner of Public Works—J. A. S.—October 30, 1934—1½ pp.*)

Section 4130 of the code concerning the change of tenancy of premises where delinquent water charges exist is valid and operative.

Citation:

Ordinance: Code '31: 4130.

LIABILITY OF RECEIVER FOR WATER CHARGES PRIOR TO HIS APPOINTMENT

(No. 8340—*Commissioner of Public Works—J. A. S.—March 22, 1934—1 p.*)

The receiver of a building is not liable for water charges which accrue prior to his appointment as receiver.

Citation:

Case: Rockford Loan and Savings Association v. City of Rockford, 352 Ill. 342 (1933).

AFFIDAVIT OF RECEIVER ON WATER CHARGES PRIOR TO HIS APPOINTMENT

(No. 6418—W. W.—April 26, 1929—1 p.)

A receiver for properties consuming city water, in order to become absolved from the payment of water charges accruing previous to his appointment as receiver, should file with the Superintendent of Water a proper affidavit together with a certified copy of the court order of his appointment.

Citation:

Ordinance: Code '22: 4159.

WATER BILL COLLECTION FROM A SUCCESSOR RECEIVER

(No. 7746—Commissioner of Public Works—M. F. M.—September 16, 1932—2 pp.)

The Commissioner of Public Works cannot transfer an unpaid water bill to the suspense account merely because a successor receiver has been appointed when fee title to the premises has not been changed.

Citation:

Ordinance: Code '31: 412.

CHARGES FOR USE OF NON-METERED WATER ON METERED PREMISES

(No. 8107—J. A. S.—June 30, 1933—2½ pp.)

A back water charge is valid which is assessed by the Bureau of Water against the owner of premises under meter control who employed the faucet on the adjoining premises which was not under meter control for watering his own lawn.

Citations:

Ordinances: Code '31: 4096, 4102.

EXEMPTION OF TRUSTEE UNDER FIRST MORTGAGE FOR WATER CHARGES

(No. 7101—Commissioner of Public Works—O. W. H.—August 29, 1931—1 p.)

The provisions of the 1922 Code will not exempt any water charges accrued against a premises unless there has been a change of ownership.

Where a trustee, under a first mortgage, assumes control of the

mortgaged property and collects the rents, there is no change of ownership so as to exempt from accrued water charges.

Citation:

Ordinance: Code '22: 4185.

WATER CHARGE EXEMPTIONS TO CHARITABLE ORGANIZATIONS—HOSPITALS

(No. 8118—*Commissioner of Public Works—J. A. S.—July 14, 1933—6½ pp.*)

A hospital is not entitled to an exemption from water charges unless it is owned and controlled by a charitable organization and its primary object is charitable in nature.

Citations:

Ordinance: Code '31: 4131.

Cases: Congregational Sunday School and Publishing Society v. Board of Review, 290 Ill. 108 (1920).
People v. Rockford Lodge, B. P. O. E., 349 Ill. 528 (1932).

WATER CHARGES ON HOME OF CHURCH JANITOR—CHARITABLE INSTITUTIONS

(No. 8402—*J. A. S.—May 23, 1934—1½ pp.*)

The residence of a janitor of a church is not considered as property exclusively used for a charitable or religious purpose and a charge for water furnished such residence is valid.

Citation:

Ordinance: Code '31: 4131.

WATER CHARGES FOR CONSTRUCTING A BUILDING

(No. 6733—*W. W.—July 28, 1930—6 pp.*)

The charge paid to the bureau of water when obtaining a permit for the water to be used in constructing a building does not include water used to cool air compressors and the contractor must pay for the additional water used.

Citations:

Ordinances: Code '22, 17: 44, 89, 4130-31.

COST OF REPLACING WATER METER

(No. 7637—*Chairman, Committee on Finance—Jud. G.—July 5, 1932—1½ pp.*)

Although the city furnishes a water meter in the first instance, the cost of replacing the meter must be borne by the water user.

*(4) Collection of Water Charges****WATER CHARGES TO CHICAGO SUBURBS†**

(No. 8510—*Commissioner of Public Works—M. H. F.—September 29, 1934—7½ pp.*)

The City of Chicago after obtaining judgments for the sums due for water supplied to suburbs can, by mandamus suits, compel such suburb to make an appropriation for, levy a tax for, and finally pay such judgments.

Citations:

Constitution: Illinois, art. IX, secs. 9, 10.

Statutes: SH '33, 24: 101.

Cases: Chicago v. Hasley, 25 Ill. 485 (1860-61).
 People v. Cairo, 50 Ill. 155 (1864-69).
 City of Cairo v. Campbell, 116 Ill. 305 (1886).
 City of Cairo v. Everett, 107 Ill. 75 (1883).
 Lewis v. Drainage Commissioners, 111 Ill. App. 222 (1904).
 Peoria County v. Gordon, 82 Ill. 48.

Other references: 38 CJ 761.

6 McQuillin, Mun. Corp. (2nd ed.), secs. 2664, 2720.

4 Dillon, Mun. Corp. (5th ed.), secs. 1483-84, 1506-07, 1543.

Broom, Legal Maxims (8th ed.), p. 153.

OPINION OF FOREGOING SYNOPSIS

With your communication of recent date you transmit a detailed statement of the delinquency of sundry suburbs in the payment for water supplied them by the City of Chicago showing in each instance a summary of the billings by years and the payments by years for each municipality. This statement shows a growth in the delinquency of each suburb involved and reveals that a considerable sum of money in the aggregate is now owing the City of Chicago. You ask our advice as to the most effective and expeditious method of protecting the city's interests. If we recommend the obtaining of a judgment against each suburb for the amount due, then you ask us to reply to the following queries.

"(a) Can the City of Chicago compel a suburb to make an appropriation for the payment of the judgment,

"(b) Can the City of Chicago compel a suburb to levy a tax to pay the judgment,

"(c) Can the City of Chicago compel a suburb to pay the judgment after appropriation has been made and tax levied?"

In reaching our conclusion that each delinquent account should be placed in judgment we have considered as possible alternative remedies the following:

1. Negotiation and voluntary adjustment. By conference with representatives of each municipality concerned work out a feasible plan satisfactory to both parties, whereby the debtor municipality would satisfy its account. This might be done by getting the municipality to undertake the payment monthly of its current water bill and the payment of a stated sum upon the past due account. It is assumed, however, that because like negotiations have been conducted during recent years that mere negoti-

*See Opinion No. 8002, p. 20, on the taxing by the state of water sold by the city.

†See also opinions on pp. 27-29, 31.

ations between the City of Chicago and its debtor municipalities would not be productive of results.

2. Arrange conference to be participated in by all debtor municipalities, some of which we understand are indebted to each other, and by a clearing house method attempt to liquidate the various accounts. This method, we presume, would be considered too intangible and unproductive of satisfactory results to the City of Chicago.

3. Shut off water from each delinquent and by this drastic means attempt to compel it to find a means of satisfying the claim against it. We have already advised you that in our opinion the City of Chicago has the legal right to discontinue furnishing water to a municipality in case that municipality fails to meet its financial obligations and pay the current water bills. This, however, would be a drastic remedy which might, and doubtless would, inflict hardship and suffering upon the individual users resident within the delinquent municipality, possibly causing famine and disease and creating fire hazards.

4. Threaten to cancel the contracts with the delinquent suburbs on the ground of non-payment, announcing to them that in the future the City of Chicago (unless the delinquent accounts are promptly paid) will supply them with only such quantities of water as are required for the immediate needs of each purchasing suburb concerned. Our understanding is that the Chicago water bureau is now furnishing to the various delinquent suburbs quantities of water in excess of those required by each suburb for use by its own inhabitants and that these suburbs are reselling at a profit the excess quantity to other adjoining municipalities. Perhaps if they realized that they would be deprived of this profit through resale of Chicago water they would find some way of satisfying Chicago. Also see paragraph 3 in connection with this point.

5. Attempt to seize and sell on execution the physical property used by the delinquent suburbs in their water departments. Though some authority for the sale on execution of property held by municipalities in their proprietary capacity may be found in other states the Supreme Court of Illinois has held in the case of *City of Chicago v. Hasley*, 25 Ill. 485, that the remedy by execution is not available and that a mandamus to compel payment or to compel a levy of taxes sufficient to discharge a judgment is the only legal way in which payment can be enforced. In the court's opinion the water works properties of the city are specifically mentioned (p. 487) and held not liable to seizure and sale on execution. Hence, our opinion is that the remedy by executions on judgments is not available.

6. Reduce to judgment all past due claims against each municipality in default. Our thought is that this remedy is the one which under all the circumstances would be most effective and best to protect the interests of the City of Chicago. We therefore recommend that it be pursued. If the city's claims are placed in judgment they would be thus secured and the judgment debtors ultimately required to pay not only the principal amount of the judgments but also statutory interest on the judgments. Furthermore, it would prevent any subsequent attempt to dispute the correctness in amount of Chicago's claims.

Replying to your queries hereinbefore set forth our opinion is that each may be answered in the affirmative. The extraordinary remedy of mandamus may be resorted to to compel a municipal corporation or its officers to perform a particular corporate or official act or duty incumbent upon it or them, to the performance of which the relator has a clear legal right. (Dillon on Municipal Corporations, 5th ed., Vol. IV, sec. 1483.) That the City of Chicago would have a clear legal right to have its judgments paid must, we think, be conceded. One of the maxims of the law is, "There is no wrong without a remedy." (Broom's Legal Maxims, 8th ed., p. 153.) Assuming that it might not sue out executions on the judgments and secure payment by means thereof, then it would follow that it did not have a plain,

ordinary and adequate legal remedy otherwise than by the writ of mandamus. Whenever there is a clear legal right in the relator, a corresponding duty in the defendant, and the want of any other adequate and specific remedy, a writ of mandamus is the appropriate process. (Dillon, sec. 1484.) Mandamus is a proper remedy by which municipal corporations are compelled to perform their duties toward their creditors. The power of municipal corporations to make contracts and create liabilities imposes the duty of providing for the payment of obligations and liabilities in the special mode prescribed by law and if no such mode is prescribed then by the levy and collection of taxes. (Dillon, sec. 1506.) When judgments are rendered and there is no property subject to execution out of which they can be met mandamus will lie and is the proper remedy to compel the levy and collection of the necessary tax to pay the judgments. When the claims are reduced to judgments the duty to provide for their payment becomes perfect and if they can be paid in no other way, it must be done by the levy and collection of a tax for that purpose and this duty will be enforced by mandamus. (Dillon, sec. 1807; *Olney v. Harvey*, 50 Ill. 453; *People v. Cairo*, 50 Ill. 155; *Rogers v. People*, 68, Ill. 154; *Peoria County v. Gordon*, 82 Ill. 45; *Lyons v. Coolidge*, 89 Ill. 529; *Dix v. Big Four Drainage District*, 207 Ill. 17; *Lewis v. Drainage Commissioners*, 111 Ill. App. 222; *City of Chicago v. The People*, 98 Ill. App. 517; 38 C. J. 761).

By section 9 of article IX of the Illinois Constitution of 1870, all municipal corporations are vested with authority to assess and collect taxes. Section 10 of the same article provides:

"The general assembly shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes, but shall require that all the taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted under authority of law, * * *"

The above constitutional provision is mandatory and requires legislative enactments for a levy of taxes to actually pay and discharge debts.

City of Cairo v. Campbell, 116 Ill. 305, holds that under section 2, article 7, chapter 24, which section directs that "the City Council of cities and the board of trustees in villages, shall, within the first quarter of each fiscal year, pass an ordinance, to be termed the annual appropriation bill, in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation," etc., the city must appropriate. It holds that the words "may appropriate" should be read "shall or must appropriate."

Repeatedly the Illinois courts have awarded mandamus to compel municipal authorities to levy and collect taxes to discharge judgments against them. (*City of Cairo v. Campbell*, 116 Ill. 305; *City of Cairo v. Everett*, 107 Ill. 75; *City of Olney v. Harvey*, 50 Ill. 453; *City of Chicago v. The People*, 98 Ill. App. 517. See also sections 2664 and 2720, Vol. 6, *McQuillin on Municipal Corporations*, 2d ed.; also sections 1506 and 1507, Vol. IV, *Dillon on Municipal Corporations*, 5th ed.)

After judgments are secured formal demands should then be made upon the debtors to pay the same. (*Lewis v. Drainage Commissioners*, 111 Ill. App. 222; *City of Cairo v. Everett*, 107 Ill. 75.) It is not essential that the judgment creditor ascertain if there are sufficient funds in the treasuries of the delinquents to pay the claims, and if not, demand tax levies. Demands for payment, followed by neglect to comply, are sufficient to authorize mandamus proceedings. (*Lewis v. Drainage Commissioners*, 111 Ill. App. 222.) If the judgment debtors do not promptly perform the duties placed upon them by law and appropriate the necessary sums to pay the judgments our thought is that you should not concern yourself with the internal financial difficulties of the debtors but that mandamus actions should be instituted and writs sought whereby the delinquents would be

compelled to levy the necessary taxes to pay the judgments. It is believed that in such actions it could easily be shown that the judgments had been obtained, that demands had been made for payment, that the debtors had failed or refused to pay and that they claimed to have no funds available for the payment and therefore that the City of Chicago was entitled to writs commanding that taxes be levied to pay the indebtedness. Once the writs were obtained our opinion is that obedience could be enforced by attaching the municipal officials guilty of disobedience for contempt. (Sec. 1543, Dillon on Municipal Corporations, Vol. IV, 5th ed.)

While the extent of a municipality's power to tax is limited by statute and it must have funds to meet its current expenses of the government, it may be required to exhaust all of its powers of taxation and honestly and economically apply its income to the end that after meeting its necessary current expenses it may discharge its other just obligations. Even though certain of the delinquents might seek to delay or defeat the City of Chicago in its attempts to collect the claims it is not believed that this should deter you from placing the delinquent claims in judgment for the reason that the claims now outstanding show little likelihood of being liquidated except under pressure, and are constantly increasing in amount.

* * * * *

STATUTE OF LIMITATIONS ON WATER CHARGES

(No. 8635—*Commissioner of Public Works—M. D. S.—January 21, 1935—1 p.*)

The statute of limitations is five years as regards the period of time for which consumers of water may be billed where water was used but not recorded. In cases of fraudulent concealment, the statute begins to run from the time of discovery.

WATER CHARGES—AS A LIEN ON REAL ESTATE

(No. 8637—*Postmaster, Supply Section, Chicago—J. A. S.—January 23, 1935—1½ pp.*)

The city is unable at present to establish a lien on real estate for delinquent water charges. An action in contract against the person or firm using the water is its only remedy.

In order to perfect a lien against real estate for unpaid water rates, the City Council must adopt by ordinance a method of establishing the lien.

Citations:

Statute: Cah. '33, 24: 1065.

Ordinances: Code '31: 4072-4154.

Case: Rockford Loan and Savings Association v. City of Rockford, 352 Ill. 348 (1933).

Opinions No. 8020 of April 18, 1933, No. 8536 of October 24, 1934, No. 8462 of July 10, 1934, No. 8309 of February 20, 1934, No. 8218 of November 16, 1933, and No. 7621 of June 24, 1932, all to the Commissioner of Public Works; and No. 8605 of December 28, 1934, and No. 8499 of September 5, 1934, are all in accord with the above opinion.

SHUTTING OFF WATER FOR DELINQUENT CHARGES— REFUND BY CITY COUNCIL

(No. 7823—M. F. M.—November 29, 1932—4 pp.)

Claims against premises, where the water charges are delinquent, are in a sense against the property, and payment can be enforced by shutting off the supply until the charges have been paid, although the City Council, in its discretion, may remit any water charges which have been paid under protest.

Citations:

Statute: Cah. '31, 24: 1065.

Ordinances: Code '31: 4128-30.

Case: Normal School v. City of Charleston, 271 Ill. 602 (1915-16).

INJUNCTION AGAINST SHUTTING OFF WATER TO COLLECT CHARGES

(No. 7385—Commissioner of Public Works—F. J. V.—December 16, 1931—2 pp.)

Where a court injunction exists, restraining the bureau of water from shutting off the water on premises in receivership, the collection of water charges cannot be enforced by shutting off the water. The Department of Water should make a written demand upon the receiver, and on his failure to pay, report the facts to the judge where the receivership is pending. After a failure of this method, the law department can formally petition the court for an order commanding the receiver to pay.

A receiver, being an officer of the court, may be called in to the court for a failure to perform his duty, and be subjected to an order of the court.

CHECK ON CLOSED BANK IN PAYMENT OF DEBT, DELINQUENT WATER CHARGES

(No. 7139—F. J. B.—September 21, 1931—1½ pp.)

When a check in payment of a delinquent water bill was mailed on June 2nd, it was presented within a reasonable time even though it was not presented for payment until after the drawee bank closed on June 8th; the bill not having been paid, the city is entitled to shut off the water supply.

Citation:

Statute: Cah. '31, 98: 207 (Negotiable Instruments act).

(5) Refunds and Discounts on Water Charges

RECOVERY OF WATER CHARGES ACCRUED UNDER PRIOR OWNER

(No. 8495—Commissioner of Public Works—O. S. F.—August 23, 1934—2½ pp.)

Where a property owner, in order to prevent the shutting off of water, made payment of water bills accrued by a former owner of the property under protest, the amount so paid may be recovered with interest from the city.

Citation:

Statute: Water Bills act (1873), sec. 4.

Cases: Chicago v. Northwestern Life Insurance Co., 218 Ill. 40 (1905).
Rockford Savings and Loan Association v. City of Rockford, 352 Ill. 348 (1933).

ENFORCING WATER CHARGE PAYMENTS—SOURCE OF REFUNDS OF WATER CHARGES

(No. 8631—Commissioner of Public Works—J. A. S.—January 18, 1935—4½ pp.)

Liability for water rates arises only by contract, express or implied, and thus the bureau of water in seeking to enforce collection is entitled or limited, as the case may be, to the relief afforded by that rule.

Refunds for water charges illegally made should come out of the same fund into which they were paid, and should not be defrayed by revenue appropriated from the corporate purposes fund.

Citations:

Ordinances: Code '31: 4127.

Coun. J. (1934-35), p. 3381 (Annual appropriation ord.).

UNPAID WATER CHARGES DUE TO REFUND

(No. 8630—Commissioner of Public Works—M. D. S.—January 18, 1935—2 pp.)

Where a water bill was paid and the money subsequently refunded because the person who occupied the premises was forced to pay the bill of former owners in order to secure water, it should be treated the same as any other unpaid account and transferred to the suspense ledger.

Citation:

Ordinance: Code '31: 4129.

REFUND OF WATER CHARGES DUE TO VACANCY IN PREMISES

(No. 8503—*J. A. S.*—September 17, 1934—1½ pp.)

To obtain a refund of the water charges when a vacancy occurs in the premises, the water charge must be paid prior to, and the notice of vacancy must be served prior to the end of the period in question.

Citation:

Ordinance: Code '31: 4126.

WATER BILL REFUNDS DUE TO VACATION OF PREMISES

(No. 7505—*F. J. B.*—March 22, 1932—2½ pp.)

In order to obtain a refund on a water bill because of a vacation of the premises, notice of vacancy must be given to the Superintendent of Water at the beginning of the semi-annual period for which refund is desired, or as soon thereafter as he may deem to have been practicable, and at a time not less than thirty days prior to the expiration of the period.

Citations:

Ordinances: Code '31: 4121-23, 4126.

WATER MAIN EXTENSIONS—REFUNDS ON EXTENSIONS

(No. 6956—*Commissioner of Public Works—F. J. B.*—June 16, 1931—2 pp.)

The city may extend a water main, if a private individual advances the cost, and refund the money without interest when a permanent annual revenue of six cents per lineal foot is being derived from the main.

Citations:

Ordinances: Code '22: 3328.

Coun. J. (1919-20), p. 1348.

REFUND OF WATER PIPE EXTENSION DEPOSITS

(No. 6482—*Commissioner of Public Works—R. N. L.*—August 1, 1929—1½ pp.)

The Department of Public Works may refund the deposit on the water mains that in themselves, or in combination with extensions from them, earn at least six cents per annum per foot, as required by ordinance.

Opinion No. 6459 of June 24, 1929, to the Commissioner of Public Works is in accord with the above opinion.

WATER CERTIFICATE REFUNDS BASED ON COMBINED EARNINGS OF EXTENSIONS

(No. 8672—*Commissioner of Public Works—M. H. F.—February 15, 1935—3 pp.*)

Where a certain water main is not of itself earning the required amount of lineal foot revenue, but other mains have been installed subsequent to and by reason of its installation and are extensions to it, and all these mains viewed as a total length do bring in the required amount of revenue, a refund should be allowed on the certificate covering the money advanced for the installation of the first main.

Citation:

Reference: Opinion No. 6482 (this volume, p. 807).

Opinion No. 8519 of October 10, 1934, to the Commissioner of Public Works is in accord with the above opinion.

BASIS OF REFUNDING ON WATER EXTENSION CERTIFICATES

(No. 8558—*Commissioner of Public Works—M. H. F.—November 14, 1934—3 pp.*)

Refunds on water pipe extension certificates should be granted only when the permanent annual revenue of at least six cents per lineal foot is derived from the entire system of mains for the laying of which certificates were issued including pipes laid in street and alley crossings, in front of sidings, and along private property.

Citations:

Ordinances: Code '22: 3328, 3332.

WATER-MAIN EXTENSION REFUNDS WHERE CITY PREVENTS REQUISITE REVENUES

(No. 6748—*Commissioner of Public Works—C. J. A.—August 11, 1930—3 pp.*)

No refund on the money advanced for the laying of a water-main can be allowed where the main has not become a permanent source of revenue, as the production of revenue was by contract made a condition of any refund. The refund is to be disallowed even though the city prevented the main from producing revenue when it acquired the abutting property.

Citation:

Ordinance: Code '11: 2228.

(The original opinion of the foregoing synopsis is reproduced on the following pages.)

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your communication of the 2nd inst. asking for an opinion from the Corporation Counsel relative to the validity of a claim for refund made on a water certificate dated May 24, 1912, issued by the Water Pipe Extension Division for an amount advanced for the installing of a 326 foot, 6 inch pipe in West 49th place, which deposit was made and accepted under the provisions of section 2228 of the Chicago Code of 1911 then in force, which read as follows:

"The commissioner of public works may extend water mains where owners of the property, or persons desiring such extension, shall advance and pay into the city treasury a sum of money equal to the entire cost thereof; and whenever, upon a proper survey, it is shown that a permanent annual revenue of ten cents per lineal foot is being derived from such water mains so laid, then such money so advanced as aforesaid shall be repaid to the person or persons so advancing the same; provided, however, if the money so advanced is not paid back within two years, interest at the rate of three and one-half per cent per annum shall be allowed after the expiration of said two years, until paid."

We note your statement that the water pipe in question has at no time brought any revenue to the city from the time it was laid until 1923, that in 1923 the City of Chicago purchased all property abutting on 49th place and vacated this portion of said street, which site is now occupied by the — Pumping Station, that by reason of these facts the main in question will never yield any more revenue.

We cannot quite understand upon what ground the claimant bases his claim for any refund. Possibly it is on the ground that the city by acquiring the property for a pumping station has prevented this water main from ever becoming a source of revenue. That, however, is no legal ground for any refund. The person who advanced the money for the laying of this main did so under a special contract with the city, one of the terms of which was that he should never be entitled to any refund unless nor until the city should receive a permanent revenue from the main of at least 10 cents per lineal foot. This condition has never been fulfilled. It is true that the city by acquiring the property for other purposes has prevented the main from ever becoming a source of revenue, but that does not constitute any breach of contract on the part of the city for the city never promised or contracted to do anything to make the water main revenue producing. The person who advanced the money for the laying of the main did it on his own risk well knowing that the main might never become revenue producing and that he might therefore never be entitled to any refund of the cost of laying such main. Furthermore, the main has never been of any benefit to the city and there is therefore neither any legal or any equitable reason why the city should refund the cost of its construction.

For the reasons above stated, we are of the opinion that the claim in question is without any basis in law and should be disallowed.

* * * * *

REFUND ON PIPE EXTENSIONS IN ANNEXED AREA

(No. 8285—President, Board of Local Improvements—L. H.—January 25, 1934—3 pp.)

A person who paid the special assessment by the village of Mount Greenwood for the installation of water supply pipes, is entitled to

the ninety per cent refund from the city's water fund appropriation, even though four of the installments were collected by the village, if he can show that the city received the money from the four installments at the time of annexation.

Citations:

Statute: Annexation act, sec. 6.

Ordinance: Code '31: 4142, as amended October 10, 1931.

REFUND OF NUMBER OF EXTENSION DEPOSITS ON BASIS OF EARNINGS AS A WHOLE

(No. 8782—*Commissioner of Public Works—M. H. F.—May 28, 1935*
—3 pp.)

When seventeen deposits instead of one were made by a realty company to cover the cost of the water pipe extensions in the company's subdivision and when a permanent annual revenue of six cents per lineal foot is being earned by the system as a whole, the seventeen deposits should be refunded as provided by the City Code.

Citation:

Ordinance: Code '22: 3328.

EXTENSION REFUNDS TO PART OWNER OF PROPERTY

(No. 6517—*City Comptroller—P. B. P.—October 2, 1929—7 pp.*)

The holder of an undivided one-fourth interest in land at the time an assessment for the laying of water pipes to the property was made is entitled to receive one-fourth of the refund of money paid to the city for the laying of the water pipes, provided he paid this portion of the assessment with his own funds, and it was not paid by the owner of the other three-fourths and there was no special agreement that the total refund should go to the owner of the three-fourths interest.

Where the holder on an undivided three-fourth interest in land has died, the money due as a refund of an assessment for the laying of water pipes should be paid to his administrator upon proof that this estate has been reopened under due order of court.

Citations:

Cases: West Park Commissioners v. Coleman, 108 Ill. 591 (1883-84).

People v. Seymour, 16 Cal. 332 (1886).

Green v. Craft, 28 Miss. 70 (1854).

State v. Camp Sing, 18 Mont. 128 (1896).

Merciers' Succession, 42 La. Ann. 1135 (1890).

REPEAL OF ORDINANCE ON EXTENSION DEPOSITS

(No. 7136—*Commissioner of Public Works—J. L.—September 18, 1931—3 pp.*)

The Revised Chicago Code of 1931 did not, by omission, expressly repeal the ordinance of 1929 specifying rates for extensions of water mains by the Water Pipe Extension Division but even if it should be held that this ordinance was impliedly repealed, such repeal would not affect any acts done under the former ordinance. An amendatory ordinance to continue the 1929 rates should be enacted.

Citations:

Statute: SH '29, 131: 4.

Ordinances: Code '31: 4139-43, 4303.

Code '22: 3328-29, 3331-32.

Coun. J. (1928-29), p. 4395.

Cases: Elgin City Banking Co. v. Chicago, Milwaukee, and St. Paul Railway, 160 Ill. App. 364 (1911).

DeWolf v. Marshall Field and Co., 201 Ill. App. 542 (1916).

**JUDGMENTS AGAINST CITY FOR WATER CHARGES PAID
UNDER PROTEST**

(No. 8569—*Commissioner of Public Works—J. A. S.—November 21, 1934—1½ pp.*)

A judgment against the city for water charges paid under protest should be paid out of the water fund, particularly the account providing for refunds.

DISCOUNT ON WATER BILLS

(No. 7855—*M. F. M.—December 26, 1932—2 pp.*)

The granting of a discount for prompt payment of water meter rates is a matter entirely within the discretion of the City Council.

The City Council has empowered the Superintendent of Water to allow an expired discount on past due water bills but has restricted this privilege to only one bill each year.

Citation:

Ordinance: Code '31: 4112 (as amended Coun J., 1932-33, p. 2813).

DISCOUNT ON WATER BILLS

(No. 7720—*Jud. G.—August 17, 1932—2½ pp.*)

Water bill payments received by the Bureau of Water subsequent

to the date due, although mailed prior to such date, are not entitled to the discount allowed for payment of bills before the due date.

Citations:

Ordinance: Code '31: 4123.

Other reference: 48 CJ 594.

**CONTROL OF MAYOR AND LAW DEPARTMENT OVER COURTS
OR SHERIFFS—COMPROMISING WATER CHARGES**

(No. 7059—Colonel, Finance Reserve, U. S. Army—L. H.—August 6, 1931—4 pp.)

Neither the Mayor nor the law department has any control over the courts, bailiffs or sheriffs.

The Superintendent of Water has no authority to accept a compromise amount on a fair water charge imposed in accordance with the proper ordinances.

D. MUNICIPAL AIRPORTS*

**LAKE FRONT AIRPORT CONSTRUCTION ON SUBMERGED
LAKE LANDS**

(No. 8492—Mayor—J. F. G.—August 17, 1934—3 pp.)

Before filling in Lake Michigan and building any lake front airport on it, the city must obtain a permit from the Director of the State Department of Public Works and Buildings.

In order for the city to construct and maintain an aircraft landing field upon the submerged lands of Lake Michigan, the "Act in Relation to Harbor Structures and Facilities" should be amended, since it is doubtful as to whether the act authorizes aircraft landing fields, hangars and other necessary facilities of that nature.

Citations:

Statutes: SH '33, 24: 598, 600c, 602.

Id. 19: 65.

Lake Front Airport: Every city having a population of 150,000 or more and bordering upon any public waters shall have the authority to establish and maintain airports in and upon any public waters in Illinois within the limits or bordering any such city and upon any submerged lands under such public waters and upon any artificial or reclaimed lands which before the reclamation constituted a portion of the submerged lands under such public water.—Ill. Laws (1935), p. 351.

*See Opinion No. 6725, p. 57, on the lease of land to the city for an airport.

**AIRPORT ON LAKE FRONT—LAKE FRONT DEVELOPMENT
ORDINANCE OF 1919**

(No. 6437—*Chairman, Sub-committee on a Lake Front Landing Field of the Committee on Railway Terminals—R. N. L.—May 24, 1929—2 pp.*)

When the South Park Board of Commissioners, the Illinois Central Railroad, and the City of Chicago, which are the parties to the lake front development ordinance of 1919 that created harbor district number three, agree to the change of the harbor district to a site for a landing field or an airport, and permission is obtained from the United States Government, the city may construct a landing field or an airport in that area.

Citations:

Ordinance: Lake Front ord. of 1919.

Statute: Cities and Villages act, art. V, sec. 65, cl. 100.

**CONSTRUCTION OF AIRPORT—RECONSTRUCTION FINANCE
CORPORATION LOAN FOR SEADROME**

(No. 7751—*Commissioner of Public Works—J. F. G.—September 21, 1932—2½ pp.*)

The Reconstruction Finance Corporation has power to make loans to state, municipal and other political subdivisions of the states to aid in financing projects authorized under federal, state, or municipal law, which are self-liquidating and any seadrome erected on the lake at Chicago would have to be such a state or municipal self-liquidating project.

The city has no power to construct, acquire, or maintain any landing place for aircraft, except under a statute which limits the city to the acquisition or leasing of real estate for the purpose of establishing landing fields for aircraft.

Citations:

Statutes: United States Emergency Relief and Construction act of 1932, Title II, sec. 201, par. (2), sub. par. (1).

SH '32, 24: 65.99.

CITY'S STATUS IN RELATION TO MUNICIPAL AIRPORT— STUDENT FLYING

(No. 6598—*Commissioner of Public Works—W. W.—February 5, 1930*
—4½ pp.)

The city in reference to the municipal airport, is acting in its corporate capacity and has only the rights of a private lessor.

The Commissioner of Public Works may not prohibit student flying at the municipal airport by an aviation company which has a definite lease for that purpose.

SUBLEASING PROPERTY FOR AIRPORT

(No. 6890—*City Comptroller—L. H.—May 4, 1931—4½ pp.*)

The city cannot sublease property for airport purposes for a period of over five years, without first advertising for bids.

Citations:

Statutes: SH '29, 24: 65.99, 512, 513, 515.

PERMIT FOR USE OF SPACE IN MUNICIPAL AIRPORT

(No. 7977—*Mayor—J. F. G.—March 24, 1933—2½ pp.*)

The permit to be issued to the Chicago Air Race Corporation for use of the Chicago Municipal Airport for an aviation exhibition is in substance a contract or lease of space in the municipal airport. No right or authority has been conferred upon the Commissioner of Public Works or the Mayor, or both of them, to enter into this type of agreement. In the absence of any provision in the ordinances of the city regarding the letting out of the use of city property for private purposes, whether for profit or charity, the permit must be authorized by the City Council.

Citations:

Statute: Cities and Villages act, art. V, sec. 1, 100.

Ordinances: Code '31: 155, 156, 205, 206.

LEASE OF HANGAR SPACE TO STATE

(No. 8920—*City Comptroller—M. H. F.—November 8, 1935—2 pp.*)

The Adjutant-General, subject to the approval of the Governor, has the authority to execute a lease between the city and the state covering hangar lots on the municipal landing field.

**CONCESSIONS IN MUNICIPAL AIRPORT—SIGHTSEEING
FLIGHTS**

(No. 8288—City Comptroller—C. H. L.—January 30, 1934—2 pp.)

The Comptroller can grant an exclusive concession to responsible concessionaires to use the municipal airport for short sightseeing flights, provided that the lease does not extend over two years, and subject to certain provisions of leases made with the Board of Education and the Boeing Air Transport, Incorporated.

Citation:

Ordinance: Code '31: 77.

**LIQUOR SALES IN MUNICIPAL AIRPORT ADMINISTRATION
BUILDING***

(No. 8913—M. H. F.—November 7, 1935—3 pp.)

The sale of alcoholic liquor in the Municipal Airport Administration Building, a building owned and controlled by the city, is expressly prohibited by the State Liquor Control law.

Alcoholic liquor, as defined by the Illinois Liquor Control act, includes every beverage containing more than one-half of one per cent of alcohol by volume.

Citation:

Statute: Ill. Laws (Sp. sess., 1933-34), p. 71 (Liquor Control act, art. VI, sec. 11).

Opinion No. 8857 of August 30, 1935, to the Deputy Liquor Control Commissioner is in accord with the above opinion.

*See also opinions on pp. 486, 487.

CHAPTER XIII

CONTRACTS AND SURETY BONDS

INTRODUCTORY

In its day to day business dealings, the City of Chicago must adopt protective devices and precautionary measures in the same manner as any large enterprise. This chapter deals with a major subject of protection, municipal purchases, and an outstanding form of protection, surety bonds.

All the purchases of the city are made through the Bureau of Central Purchasing in the Department of Public Works. Except for petty cash expenditures, the various city departments send requisitions for goods and services to the Bureau of Central Purchasing which makes the contract or purchase. Purchases involving over five hundred dollars, unless the City Council by a two-thirds vote authorizes the Commissioner of Public Works to award the contract without so doing, must be awarded by competitive bidding to the lowest responsible bidder.

In awarding these contracts, the city encounters a number of complicated legal problems. What are fair and just bidding specifications and when do specifications become unreasonable or discriminatory? What discretion rests with the Commissioner of Public Works in determining the "lowest, responsible bidder?" When has a contract been violated and in what respects can it be modified? Under what conditions may a contract be terminated or abrogated?

With reference to surety bonds there arises a basic question as to what constitutes adequate protection under a surety bond. Do certain provisions introduced in the bond invalidate or weaken its effectiveness? Also, what criteria may be used in determining the reliability of the surety and under what conditions may and are the surety's obligations terminated?

Surety bonds cover a wide range of activities and situations. License bonds are required for pawnbrokers, private detective agencies, housemovers, window cleaners, exterminators and numerous other activities. Contracts with the city are covered by surety bonds of the contracting party serving the city. Bonds are also required for the establishment of structures upon, over or under public streets, such as canopies, tunnels and vaults, conduits and

pipes, loading platforms and switchtracks. These are but a sample of the different types of surety bonds required by the city.

Thus, through competitive bidding and surety bonds, the city is enabled to save vast sums of money each year. The former brings an economy in expenditures. The latter offers a protection against financial loss or violation of obligations.

A. CONTRACTS

(1) Power to Enter into and Cancel Contracts

CONTRACTS EXTENDING BEYOND A FISCAL YEAR

(No. 7829—Chairman, Committee on Finance—L. H.—December 2, 1932—5½ pp.)

The power of the City Council to authorize a contract extending beyond the fiscal year is uncertain. While an antecedent appropriation sufficient to meet payment for the entire period is necessary, an antecedent appropriation for only one year will not be treated as void, and if the Council follows up and makes an additional appropriation from year to year, it will be construed as a ratification of an executory contract for that year.

Citations:

Statute: SH '31, 24: 104.

Cases: Chicago v. McDonald, 176 Ill. 404, (1898).

Chicago v. Galpin, 163 Ill. 399 (1896).

Avery v. Chicago, 345 Ill. 640 (1932).

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of November 30, 1932, relative to a contract for burglar alarm service in connection with the vault in the City Treasurer's office.

You state in your letter that the City Treasurer is installing an A.D.T. burglar alarm system, and that the service in connection therewith requires that a contract be entered into for a period of five years. You ask to be advised whether such action would be legal and whether it is within the power of the City Council to authorize such a five year contract.

The question of the power of the City Council to authorize a contract extending beyond the current fiscal year is one which arises frequently, and the law in relation thereto has caused many difficult situations. In fact, realizing the difficulty of providing for the needs of the city in all cases within the limits of the law in this respect, it has been found necessary at times to permit a latitude which was at least questionable.

The statutory provision relating to the subject in hand is contained in section 4 of article VII of the Cities and Villages act (Smith-Hurd 1931 Statutes, p. 363). * * *

Prior to July 1, 1930, that provision which now permits expenditures during the period of the fiscal year pending the passage of the annual appropriation bill was not contained in the statute, and the only basis for such expenditures was an inferential interpretation of a supreme court decision. At the present time, while the statute permits the making of a contract and the incurring of an expense before the annual appropriation bill is passed, the law remains the same as before with respect to making a contract for which no antecedent appropriation has been made.

In looking up the decisions of our courts on the question presented, we find that in almost every instance where the Supreme Court passed on the proposition it was tied up with the question of whether or not the debt limitation was exceeded and the decision hinged on this point, so that if

there is no question about the debt limitation being involved we are still without positive judicial authority to guide us to a correct conclusion.

One of the leading cases on the subject is the case of *City of Chicago v. McDonald*, 176 Ill. 404, involving a contract for garbage disposal extending over a period of five years. The contract was entered into in pursuance of a special act authorizing contracts for the final disposition of garbage in excess of one year and not exceeding five years. Consequently, the case did not involve a question as to the authority to contract for five years, but only whether an obligation created thereby increased the indebtedness of the city beyond the constitutional limitation. Nevertheless, in deciding the case the Supreme Court went over the ground covered in former decisions and indicated clearly that if it were not for the special act authorizing a contract of that kind for more than one year it would be void regardless of whether or not the indebtedness created thereby raised the total indebtedness of the city beyond the limit prescribed by the constitution. In reviewing its previous decisions the court indicated that the question arising in the *McDonald* case hinged on the point whether or not a "present indebtedness" was created, and it seems that a "present indebtedness" is created in a contract for service when the contract calls for payment of a fixed amount per month or per year, while on the other hand only an executory contract is created when the compensation depends on the varying amount of service rendered from time to time. The theory in such an event is that there is an implied contract to pay created each month on account of the service rendered which may vary from month to month according to the amount of service rendered.

Shortly after deciding the *McDonald* case the Supreme Court was again called upon to decide a question of like import—this time, however, based on the lack of an antecedent appropriation. In deciding this later case (*City of Chicago v. Galpin*, 183 Ill. 399) the court held that it was not improper to make a contract covering a number of years if the appropriation on which it was predicated was sufficient to cover all "present indebtedness," but that such a contract is void unless the appropriation is large enough to cover the entire term where the amount of the payments is fixed.

The earlier decisions seem to have been modified somewhat, however, in the recent "dead animal removal" contract case (*Avery v. City of Chicago*, 345 Ill. 640), where it was held that section 4 of article VII of the *Cities and Villages Act* quoted above requires a sufficient appropriation to cover any liability before incurring of the liability, but that where the City Council has authorized a contract for a term of five years and failed to make an appropriation to cover the entire term the contract is not void from its inception, and a single annual appropriation is sufficient to authorize payment for services performed under the contract for one year.

You will observe, from what we set forth above, that the decisions are not as consistent as they might be and that there still remains room for doubt on this vexed question which has so often come up.

In the case presented by your letter, however, we believe it will be proper to follow the pronouncement of the court in the recent case just cited, which we understand to be as follows:

The law requires an antecedent appropriation sufficient to meet the payments for the entire period of five years, but if there is an antecedent appropriation for only one year the contract will not be treated as void, and if the Council follows up the matter and makes additional appropriations from year to year, such additional appropriation each year will be construed as a ratification of an executory contract for that year. By thus keeping faith with the contractor the contract may be entered into and carried out as intended even though the specific requirement of the statute has not been complied with and even though the amount of the annual or monthly compensation is fixed.

* * * * *

CONTRACTS PRIOR TO APPROPRIATION ORDINANCE

(No. 7964—*Commissioner of Public Works—L. H.—March 8, 1933—*
2½ pp.)

A contract cannot be entered into by the city for the forthcoming year before the passage of the annual appropriation ordinance except for a necessary expenditure authorized by the City Council and upon the basis of the appropriation for the preceding fiscal year.

Citation:

Statute: SH '31, 24: 104.

CONTRACT EXTENSIONS UNTIL APPROPRIATIONS PASSED

(No. 8578—*Commissioner of Public Works—J. F. G.—December 3,*
1934—1½ pp.)

The City Council has the authority to extend certain coal contracts until the date of the passage of the 1935 appropriation ordinance and until new contracts can be made effective under that ordinance.

Citations:

Statute: Cities and Villages act, art. VII, sec. 4.

Other reference: Opinion No. 7964 (this page).

**CONTRACTS WITHOUT AVAILABLE APPROPRIATIONS—
VOUCHERS IN PAYMENT OF CONTRACTS**

(No. 8969—*Commissioner of Public Works—J. F. G.—December 16,*
1935—1½ pp.)

No contract may be entered into without an unexpended or unencumbered appropriation of funds sufficient to meet the obligations of the contract, and the head of the department has authority to pass vouchers against any appropriation for contracts properly entered into and executed without special authority from the City Council.

BOND TO GUARANTEE AVAILABILITY OF CITY PROPERTY

(No. 8725—*Commissioner of Public Works—O. W. H.—March 21, 1935*
—1 p.)

The city cannot legally execute a bond guaranteeing the availability and readiness of city property for convention purposes.

CANCELLATION OF CONSTRUCTION CONTRACT

(No. 7844—*Commissioner of Public Works—C. J. A.—December 17, 1932—1½ pp.*)

When a contract for supplies was made but no action taken for several years to fulfill the contract, and the appropriations for the year of the contract have been exhausted, the Commissioner of Public Works may cancel the contract.

CANCELLATION OF UNNEEDED CONTRACT—CONTRACT BIDS

(No. 6681—*Commissioner of Public Works—C. J. A.—May 27, 1930—6 pp.*)

The city having once contracted for shut-off cocks cannot refuse to accept them merely because it does not need them. The contract can be canceled only if the company, upon due notice by the Commissioner of Public Works and a reasonable time for such delivery, fails to deliver the shut-off cocks.

The company is not incompetent to bid on a contract for corporation cocks, if it is not actually in default on the contract for stop-cocks, and is willing to carry out the contract for stop-cocks within a reasonable time fixed by Commissioner of Public Works.

BREACH OF CONTRACT BY DELAY

(No. 8988—*Acting Commissioner of Streets and Electricity—J. F. G.—December 26, 1935—4 pp.*)

When a contract for the purchase of lamp posts provides that the time of commencement and completion of the contract are essential conditions, and delivery has not been commenced, or has not proceeded with reasonable dispatch, the Acting Commissioner of Streets and Electricity may notify the company contracted with that on account of the lapse of an unreasonable time for completion of the contract, he is compelled to purchase the required lamp posts from others who can arrange for prompt delivery, and that the company will be charged with any damage resulting from the breach of contract.

BREACH OF PLUMBING CONTRACT—RELETTING OF CONTRACT

(No. 6493—*Commissioner of Public Works—M. H. F.—August 15, 1929*
—6½ pp.)

Under the terms of a contract of April 8, 1929, between the city and a private individual for plumbing work, the Commissioner of Public Works is given a wide latitude to decide when the contractor has defaulted and to declare the contract forfeited, and his action, reasonably based, will doubtless not be disturbed by the court.

A reletting of the contract to the lowest bidder is not required, if a surety company completes the work, as an agent for the city, after the contractor has abandoned it.

The city should readvertise for bids before reletting a contract to complete a public improvement abandoned by the contractor.

Citations:

Case: *Chicago v. Hanreddy*, 211 Ill. 24 (1904).

Other reference: 5 McQuillin (2nd ed.), sec. 2083.

*(2) Bidding and Awards****BIDDING FOR CONTRACTS OVER \$500**

(No. 8389—*Commissioner of Public Works—M. H. F.—May 14, 1934*—
3 pp.)

Any proposed contract exceeding five hundred dollars must be let to the lowest responsible bidder, after advertising the same, unless specifically directed otherwise by a two-thirds vote of the City Council.

Citations:

Ordinance: Code '31: 90.

Case: *Avery v. Chicago*, 345 Ill. 640 (1932).

ADVERTISING FOR CONTRACTS OVER \$500

(No. 6644—*Commissioner of Police—J. W. B.—April 19, 1930—1½*
pp.)

The city cannot enter into a contract for the performance of any work or the purchase of any material, when the price is in excess of \$500, without advertising at least ten days for bids, unless the City Council by a two-thirds vote of all its members passes an order

*See Opinion No. 7891, p. 850, on compelling the award of a contract by mandamus, Opinion No. 8560, p. 863, on the approval of contract awards, and Opinion No. 7743, p. 864, on contracts of the Board of Local Improvements.

authorizing the entering into the contract without advertising and without competitive bidding.

Opinions No. 6472 of July 17, 1929, and No. 8950 of November 29, 1935, both to the Commissioner of Public Works are in accord with the above opinion.

CORRECTION OF IMPROPER ADVERTISING FOR BIDS

(No. 7994—City Comptroller—L. H.—April 3, 1933—4 pp.)

An irregular procedure followed in advertising and in considering bids for the official newspaper can be cured by the rejecting by the Comptroller of all previous bids and readvertising in accordance with a Council order, and the passage by the Council of a proper remedial ordinance.

Citations:

Ordinances: Code '31: 680-686 (Official newspaper).
Coun. J. (1932-33), pp. 3364, 3439, 3451.

SPECIFICATIONS FOR BIDS

(No. 7391—Commissioner of Public Works—Jud. G.—December 17, 1931—3½ pp.)

The specifications of a contract should be so drawn that the opportunity for competitive bidding is real in fact, not only in form.

If a contract were to specify one commodity which could be furnished by but one dealer the use of that commodity would have to be authorized by a special conference of the City Council.

SPECIFICATIONS IN ADVERTISING FOR BIDS FOR ALTERNATIVE ARTICLES—PATENTED ARTICLES

(No. 6842—Commissioner of Gas and Electricity—M. H. F.—March 2, 1931—3½ pp.)

The city may invite bids in various forms or upon alternative articles, provided each proposal is upon a definite and specific plan, is attended by specifications covering every material detail, and is sufficiently definite to enable bidders to conform to it.

The legal requirement for letting contracts on competitive bids is satisfied, if the advertisement specifies both patented and unpatented articles and calls for bids on both, so as to bring the bids for unpatented articles in competition with those for the patented articles.

Citations:

References: 3 McQuillin, Mun. Corp. (2nd ed.), secs. 1299, 1312.
Donnelly, Law of Public Contracts, secs. 113, 116.

SPECIFICATION THAT EMPLOYEES BE RESIDENT

(No. 7223—*Commissioner of Public Works*—L. H.—October 28, 1931—3 pp.)

A resolution by the City Council that in the letting of contracts by the city one specification should be that the contractor shall employ only residents of Chicago cannot lawfully be enforced as such restriction is unconstitutional.

Citations:

Constitution: United States, 14th amendment.

Case: Doyle v. People, 207 Ill. 75 (1904).

Other reference: Dillon, Mun. Corp. (4th ed.), sec. 808.

PREVAILING WAGE REQUIREMENTS IN CONTRACTS

(No. 7200—*Commissioner of Public Works*—L. H.—October 20, 1931—1 p.)

As the so-called "Prevailing Wage law" has been held invalid, all public contracts should be advertised in the manner that was lawful and proper before the passage of that law. This will require re-advertising in all cases where the form prescribed in the new statute was followed, but the contract has not yet been awarded.

Opinions No. 7021 of July 20, 1931, to the President of the Board of Local Improvements, and No. 7043 of July 31, 1931, to the Commissioner of Public Works discuss the same point as the above opinion.

SPECIFICATIONS RESTRICTING INTERSTATE COMMERCE

(No. 6875—*Commissioner of Public Works*—C. J. A.—April 24, 1931—3 pp.)

The specifications of the Department of Public Works cannot limit the bidding to corporations entered on the current certified Illinois list of domestic and foreign corporations because corporations engaged in interstate commerce who are not on the list will be excluded from the bidding.

Citations:

Cases: Holder v. Aultman, 169 U. S. 81 (1898).

International Text Book Co. v. Pigg, 217 U. S. 91 (1910).

Other reference: Op. Corp. Counsel (1923-24), pp. 49, 451.

CHARGES AGAINST CONTRACTOR UNTIL CONTRACT PERFORMED

*(No. 7490—Commissioner of Public Works—C. J. A.—March 12, 1932
4½ pp.)*

A plan involving the charging of a contractor of the city a certain sum per day for each and every day consumed in the performance of the contract with the city would be valid, but it must be properly set forth in the specifications for bidders, so that all prospective bidders are able to bid for the contract on equal terms.

Citations:

Cases: Ludlow Manufacturing Co. v. Chicago, 181 Ill. App. 388 (1913).
Bartholomae and Roesing Brewing and Malting Co. v. Modzelewski, 269 Ill. 539 (1915).
Chicago v. Duffy, 218 Ill. 242 (1905).
Katterjohn v. Board of Education, 202 Ky. 690 (1923).
Henry Bickel Co. v. Commissioners of Sewerage, 207 Ky. 234 (1925).

Other reference: 44 CJ 349, 350, 391.

QUALIFICATIONS IN BID

*(No. 8084—Commissioner of Public Works—L. H.—June 5, 1933—
2½ pp.)*

The insertion in a bid for a coal contract of the provision that the bid is "subject to any governmental legislation or regulation that may affect the cost of production or distribution of coal" renders the bid non-competitive and it must be rejected.

CONSIDERATION OF ALTERNATIVE BIDS

*(No. 6770—Commissioner of Public Works—C. J. A.—September 23,
1930—7½ pp.)*

An alternative proposal of a company bidding for a city contract which is based on elements so different from those contained in the specifications to bidders that comparison with other bids is impossible, cannot lawfully be considered by the Commissioner of Public Works.

ACCEPTANCE OF ALTERNATIVE CONTRACT BIDS

(No. 7785—Mayor—L. H.—October 19, 1932—2 pp.)

When the City Council by a two-thirds vote orders the acceptance of an alternative proposal which does not conform precisely with the specifications called for on the contract, there is no need to again advertise for bids.

Citations:

Statute: SH '31, 24: 129.

Ordinance: Coun. J. (1932-33), pp. 29, 42.

RETURN OF BID DEPOSITS AFTER CONTRACT AWARDED— MODIFYING OR WITHDRAWING BIDS

(No. 8206—Commissioner of Public Works—L. H.—November 6, 1933—5 pp.)

A bidder who withdraws his bid after the bids have been opened and the contracts awarded to the bidder may not recover the deposit on his bid.

A contract exists when a bid has been accepted and an award made, the written agreement being only written evidence and confirmation of the contract.

Bids cannot be modified after the date set for submission nor can they be withdrawn after an award has been made.

Citations:

Cases: Robinson v. Board of Education, 98 Ill. App. 100 (1902).

Morgan v. Gahan, 136 Ill. 515 (1890-91).

Chicago v. Mohr, 216 Ill. 320 (1905).

Other references: L. R. A. (1915(A), p. 221.

Ann. Cas. (1916(C), p. 420.

Dillon, Mun. Corp. (5th ed.), sec. 810.

McQuillin, Mun. Corp. secs. 1323, 1324.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter in regard to the deposit on bids submitted in connection with the purchase of power and telephone cable.

It appears from the correspondence and other data submitted by you that you advertised for bids to be submitted and that at the appointed time the bids were opened and scheduled with the result that the contract for a part of the proposed purchase was awarded to the * * * Company and the contract for the remainder of the purchase was awarded to the * * * Company. This division of the proposed purchase into two contracts was permissible under the clause in the specifications which authorized the Commissioner of Public Works to award separate contracts for power and telephone cables.

On the day after the awards were made the two companies sent letters to the Commissioner of Public Works saying that they had made mistakes in their bids and desired to withdraw them. These letters reached the commissioner after the awards were made, probably within a day or two. Both contractors failed to sign the contracts prepared for them within the

allotted time, and therefore, in pursuance of the express conditions named in the specifications, the two deposit checks were retained by the city and the contracts were awarded to other bidders.

Both the companies now demand the return of their deposits and claim that they are entitled to them because they gave notice that they were withdrawing their bids.

Under the state of facts presented the city has the right to forfeit and retain the deposit of these companies. The general rule which governs the case is stated in the following language by an eminent authority on the subject:

"Where a bidder accompanies his bid for the performance of a public work with the deposit of a certain sum under an agreement to forfeit the sum deposited in case of his neglect or refusal to enter into the contract for the work, and, without default on the part of the board, he fails to execute the contract, he cannot recover back his deposit, and the board may declare the same forfeited." Dillon on Municipal Corporations, 5th ed., sec. 810.

The general principle thus announced is supported by ample authorities in the State of Illinois, among which are the following:

Robinson v. Board of Education, 98, Ill. App. 100;

Morgan Park v. Gahan, 136 Ill. 515.

Both of these companies have submitted to you arguments to the effect that where a mistake is made by a bidder and the mistake is discovered and called to the attention of the city before the bid is acted upon the bid will be held to be of no effect and the deposit can be withdrawn. It is claimed that your attention was called to the mistake before any action had been taken on the bids. This argument, however, does not impress us greatly because action was taken on the bids when they were opened and the contracts were awarded.

In a case for damages for breach of contract brought against the city several years ago the city sought to defend on the theory that the contract was not consummated until the written agreement was signed by the city's officers and approved by the mayor, but the court held that the contract existed when the bid was accepted and the award was made, and that the written agreement was only the written evidence and the confirmation of the contract. The same rule applied to the situation before us makes it clear that the bid was acted upon before there was any notice of mistake or withdrawal.

It was long ago held in this state and it is the established law of the state that a bid cannot be modified after the date set for submission. (See Chicago v. Mohr, 216 Ill. 320.) It follows that if the bidder wishes to withdraw a bid and avoid the consequences of a failure to perform he must do so before the bids are opened or at least before the award is made. Even the authority relied on by counsel for the two contractors (McQuillin) does not bear them out. The rule which they cite does not cover the situation that is presented. They do not copy into their letter the whole of the two paragraphs which are pertinent to the subject, but only one sentence therefrom relating to the inadvertent mistakes of the bidder. The following is what the author says on the subject:

(Sec. 1323) "Money accompanying a bid as security that the bidder will enter into a contract if his bid is accepted cannot be recovered back if the bidder fails to enter into the contract. 'The rule that courts incline against forfeitures has no application to such a case, and the rule is never carried to the extent of relieving parties against the express terms of their own contracts.'" * * *

(Sec. 1324) "Inadvertent mistakes in a bid usually warrant the withdrawal of same before the bid is acted upon. Accordingly if a bidder has submitted a mistaken bid he may maintain a bill in equity

for a reformation thereof, provided he files the same within a reasonable time. Aside from such a remedy, it is held that a bidder has no right to withdraw his bid even before the bids are opened, nor have the municipal authorities the right to permit him to withdraw it." *McQuillin on Municipal Corporations*, secs. 1323, 1324.

A number of late authorities sustaining the above will be found in *L. R. A.* 1915-A at page 221 and *Ann. Cas.* 1916-C at page 428.

From an examination of these authorities it will appear that these companies and their counsel are making the mistake of assuming that the bids had not been acted upon, but the bids were in fact acted upon when they were opened and the contracts were awarded. Indeed, it is hard to understand what these parties conceive to be action on the bids if it is not what we say.

We are therefore of the opinion that you are justified in retaining the deposits in accordance with the terms of the bidding as set out in the specifications.

Opinion No. 8227 of November 24, 1933, to the Commissioner of Public Works is in accord with the above opinion.

REFUSAL OF BIDS AT END OF FISCAL PERIOD

(No. 7911—*City Comptroller—Jud. G.—January 24, 1933—1½ pp.*)

After the year 1932 has expired, the City Comptroller may refuse all bids for the printing of official advertisements for the balance of the year 1932 and return the depositary checks to the bidders.

CERTIFIED CHECK ACCOMPANYING CONTRACT BID

(No. 6824—*Commissioner of Public Works—L. H.—January 8, 1931—2 pp.*)

Where bid specifications require a certified check on a Chicago bank as evidence of good faith and the bidder submits a certified check on a New York bank, he may substitute a check on a Chicago bank to correct the error.

TIME LIMIT IN AWARDING CONTRACTS

(No. 6421—*Commissioner of Public Works—J. W. B.—May 1, 1929—3½ pp.*)

There is no limit to the time after the opening of bids in which the Commissioner of Public Works may award a contract.

No contract can be entered into until an appropriation for it has been made by the City Council.

Citations:

Ordinance: Code '22: 3260-62.

Statute: Cities and Villages act, art. VII, sec. 4.

EXTENSION OF COMPLETED CONTRACT—CITY COUNCIL DELEGATION OF POWER TO AUTHORIZE CONTRACTS

(No. 7731—*City Comptroller—L. H.—August 24, 1932—3 pp.*)

Where final payment has been made for all obligations under a contract, the contract is fully executed and cannot be extended. However, a new contract with similar covenants and agreements for a new period may be entered into by the City Council.

The City Council, by a two-thirds vote, may authorize contracts for public improvements without advertising but this power cannot be delegated to or exercised by a council committee. However, the Council generally ratifies such authorizations made by the Finance Committee during the City Council's summer vacation.

Citation:

Statute: SH '31, 24: 129.

AWARDING OF CONTRACTS BY COMPETITIVE BIDDING— DISCRETION IN AWARDS

(No. 8110—*Commissioner of Public Works—C. N.—July 10, 1933—2½ pp.*)

Upon a two-thirds vote of the aldermen, the proper officer of a city may enter into a contract for a public improvement without advertising for bids, regardless of how the public work is paid for.

Under the requirement that city contracts must be awarded to the "lowest responsible bidder," the City Council has broad discretion in awarding the contract and its action can be attacked only for fraud or bad faith.

Citations:

Statute: Cities and Villages act, art. IX, sec. 50.

Case: Chicago v. Hanreddy, 211 Ill. 24 (1904).

Other reference: McQuillin Mun. Corp. (2nd ed.), sec. 1329.

COMMISSIONER OF PUBLIC WORK'S DISCRETION IN AWARDING CONTRACTS

(No. 6749—*Commissioner of Public Works—S. L. G.—August 12, 1930—4½ pp.*)

The Commissioner of Public Works must use his own discretion and judgment in awarding a construction contract to the lowest responsible bidder. The legal presumption that his action was regular and

lawful can be overcome only by proof that he acted fraudulently or without jurisdiction.

Citations:

Statute: Local Improvement act, sec. 76.

Cases: *People v. Kent*, 160 Ill. 65 (1896).

Kelly v. Chicago, 62 Ill. 279 (1871-72).

Johnson v. Sanitary District, 163 Ill. 285 (1896).

Hallett v. City of Elgin, 254 Ill. 343 (1912).

CONTRACT AWARD FOR OFFICIAL NEWSPAPER TO OTHER THAN LOWEST BIDDER

(No. 7887—*Mayor—L. H.—January 6, 1933—3 pp.*)

The board which awards the contract for the official newspaper of the city may exercise some discretion as to the responsibility, reliability and circulation of the bidders, and on the basis of these factors award the contract to a paper other than the lowest bidder. If the board proposes to award the contract to a bidder whose bid is substantially higher than another, it would be well to report the intention to the City Council, whose action in the matter would be conclusive.

Citation:

Ordinances: Code '31: 681, 684.

MISTAKEN PROVISION FOR TAX EXEMPTION IN BID— AWARD TO LOWEST RESPONSIBLE BIDDER

(No. 8171—*Commissioner of Public Works—Q. O'B.—September 11, 1933—4½ pp.*)

Where a company submits a bid for oil supply to be paid out of the water fund under a mistake of fact that such oil is exempt from the federal excise tax and the bid provided that the city should furnish an exemption certificate for this tax, such bid may still be accepted by the Comptroller when the error is corrected by a supplemental writing, if he considers it the lowest responsible bid.

The phrase "lowest responsible bidder" enables the Commissioner of Public Works, in accepting bids, to consider the amount of the bid, the financial and business responsibility of the bidder and anything else that may be requisite under the terms of the contract.

Citations:

Ordinances: Code '31: 222-224.

Cases: *Wagner v. City of Rock Island*, 146 Ill. 154 (1892-93).

People v. Omen, 290 Ill. 59 (1920).

Hallett v. City of Elgin, 254 Ill. 343 (1912).

People v. Kent, 160 Ill. 655 (1896).

Chicago v. Lohr, 260 Ill. 320 (1913).

Other reference: 3 *McQuillin, Mun. Corp.* (2nd ed.), secs. 1329, 1334.

(The original opinion of the foregoing synopsis is reproduced on the following pages.)

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter requesting an opinion whether or not the Department of Public Works may enter into a contract with a bidder under the following circumstances:

In response to the advertisement and proposal for bids of the Department of Public Works of the City of Chicago for furnishing lubricating oils to be used in the water department, a number of bids were received. The lowest bid was qualified by the following proviso:

"Above prices are Federal Tax exempt. City of Chicago to furnish Exemption Certificate."

Your letter states that "The bidder in question is the low acceptable bidder, even with the addition of the four cents," and inquires "Under the above circumstances, can the Department legally enter into a contract for the oil at 25½¢ plus the 4¢ tax, or will it be necessary to reject the bids and readvertise?"

Under date of July 10, 1933 we rendered you an opinion based on *Wagner v. City of Rock Island*, 146 Ill. 154, that oil purchased by your department paid for out of the water fund is a feature of municipalities private rather than a governmental function in the exercise of local sovereignty. Such oil would not be exempt from the Federal Excise Tax of four cents per gallon. The bidder, in the foregoing proviso evidently assumed that the city was exempt from this tax. The internal revenue office again today informed us that the tax must be paid.

Our Municipal Code of 1931, sections 222-224, provides that such contracts by your department involving more than \$500.00 shall be let to "the lowest reliable and responsible bidder" after due advertisement for such bids except in such cases when authorized to make contracts "by a vote of two-thirds of all the aldermen elected." The phrase "the lowest reliable and responsible bidder" gives you considerable latitude to exercise your good judgment and discretion for the benefit of the city. This phrase legally permits you, in accepting bids and making contracts, to consider not only the amount of the bid and the financial and business responsibility of the bidder but anything else that may be requisite under the terms of the contract. This appears from the following authorities:

People ex rel. v. Omen, 290 Ill. 59.

Hallett v. City of Elgin, 254 Ill. 343.

People v. Kent, 160 Ill. 655.

McQuillin on Municipal Corporations (2d ed.), volume 3, section 1329, says that municipal authorities acting for the protection of the public interests have a broad discretion in determining what bid is the one most nearly answering such requirements where the bid can be considered to be in accordance with the terms of the advertisement, and that in the use of such discretion and decision said authorities act as judicial and not ministerial officers, and the courts rarely disturb the decisions made under such discretion where they seem to be for the public good and are not tainted with favoritism or fraud.

The same authority (section 1334) says that while the bid must be in substantial compliance with the proposal of the advertisement in all material respects,

"However, mere irregularities in the form of the bid will not justify its rejection, for these may be corrected after being opened on entering into the contract. An important question, therefore, sometimes arising is whether the municipality is in duty bound to reject a bid not in compliance with the proposal or whether it may, in its discretion, overlook the insufficiency and notwithstanding its existence award the contract to one who is the lowest bidder but has not strictly complied with the request for bids. In some cases it has been held that the municipality

may accept such a bid. The rule supported by reason would seem to be that if the omission or irregularity is merely technical it may be overlooked, but that if it is a substantial requirement affecting the amount of the bid or the like the municipality must reject such bid notwithstanding it is the lowest bid."

If the proviso relative to the tax in the bid was based on misunderstanding or error as to the fact, as you seem to think, then under the rule laid down in *City of Chicago v. Lohr*, 260 Ill. 320-329, you would be authorized to allow them to correct this error of fact appearing on the face of the bid by supplemental writing and accept the bid so corrected.

Inasmuch as the market price of oil has advanced since this bid has been made and is advancing almost daily and it is probable that on a new advertisement now calling for bids you could not obtain such favorable ones and inasmuch as the bid plus the four cent tax is still the lowest bid, it is probably not only your duty but to your advantage to accept it as you undoubtedly have the right to do. Before definitely and formally accepting it, it might be well for you to bring the matter to the attention of the company and inform them that the changes in the ruling of the Internal Revenue department, June 16, 1933, in reference to brokers does not exempt the city from paying the tax in water department contracts and see if you cannot by persuasion, induce them to pay it. Under such circumstances there is no legal or rational objection to your getting better terms for the city if you can. In the event that said company agrees to pay the tax we advise that you secure from it a written memorandum to that effect. If the company refuses to pay the tax it is not necessary to reject its bid. Under all the circumstances it should be accepted.

* * * * *

CONTRACT AWARD TO SOLE BIDDER

(No. 6447—*Commissioner of Public Works—F. J. C.—June 6, 1929—*
2½ pp.)

If only one bid has been received after a proper advertising for bidders, the Commissioner of Public Works may let the contract to this bidder, if he is reliable and responsible and the amount stated in the bid is within the estimate fixed in the advertisement or is a reasonable amount to be paid for the work done or the materials furnished.

Citation:

Ordinance: Code '22: 3260-62.

CONTRACT FOR EXPERT SERVICES

(No. 8085—*Commissioner of Public Works—L. H.—June 6, 1933—*
2½ pp.)

The employment by the city of persons of special technical knowledge need not be contracted by means of competitive bidding even though the value of the contract may exceed \$600.00.

The City Council has power to authorize a contract with a consulting engineer whereby the engineer receives as compensation a certain

percentage of the savings to the city effected by fueling changes recommended by him.

Citations:

- Cases:** Tachett v. Middleton, 280 S. W. 563 (Tex. 1926).
 Price v. Fargo, 24 N. D. 440 (1913).
 New Jersey Suburban Water Co. v. Riordan, 132 Atl. 318 (N. J. 1926).
 Beshear v. Dawson Springs, 214 Ky. 102 (1926).
 Sanitary District v. Blake Manufacturing Co., 179 Ill. 167 (1899).
Other reference: 3 McQuillin, Mun. Corp., sec. 1289.

CONTRACT TO BIDDER CHARGED WITH PATENT INFRINGEMENT

(No. 7319—C. J. A.—November 24, 1931—2 pp.)

The city might become liable for damages if it should refuse to award a contract to the lowest bidder because of alleged patent infringement on the part of the bidder, should it subsequently be determined that there is no infringement.

The city can properly award a contract to the lowest bidder where an alleged patent infringement is charged, if the bidder files a bond to save the city in case of an actual patent infringement.

CONTRACTS WITH CORPORATIONS IN RECEIVERSHIP

(No. 6633—Commissioner of Public Works—C. J. A.—April 9, 1930—3 pp.)

The city can enter into a contract with a corporation administered by receivers, if the receivers have authority from the court appointing them to make the contract.

A receiver has no inherent powers but has only those powers conferred on him by the court.

Citations:

- Cases:** Hooper v. Winston, 24 Ill. 353 (1860).
 Knickerbocker v. McKindley Coal Co., 172 Ill. 535 (1898).
 Davis v. Gray, 83 U. S. 203 (1872).
Other reference: 20 American and English Encyclopedia of Law 111.

CONTRACTS WITH FOREIGN CORPORATION IN RECEIVERSHIP

(No. 8125—Commissioner of Public Works—E. L. M.—July 20, 1933—1½ pp.)

Although a contract entered into by the city with a foreign corporation in receivership is valid and the company would be legally

bound thereby, it would be unwise to enter into such contract because of the difficulty in adjusting differences that may arise in the course of the performance of the contract.

Citation:

Case: Hooper v. Winston, 24 Ill. 353 (1860).

BIDS FOR PUBLIC WORKS CONTRACTS BY FOREIGN CORPORATIONS

(No. 8187—A. F. G.—October 14, 1933—2 pp.)

A foreign corporation which is registered and authorized by the Secretary of State to transact business in the State of Illinois may submit bids for public works for the city without any other preliminary qualifications, but if it is a successful bidder, the Department of Public Works may require proof of its reliability, responsibility and ability to perform the work satisfactorily.

AWARDS FOR OFFICIAL NEWSPAPER OF CITY

(No. 7306—City Comptroller—C. J. A.—November 19, 1931—2 pp.)

The City Comptroller in advertising for bids for the official newspaper is without authority to refuse in advance to accept bids from newspapers of less than 30,000 circulation; however, he may, in considering bids received as to the lowest and responsible bidder, exercise the right to reject the bid of any newspaper having less than a 30,000 circulation, if he finds that newspapers with a much larger circulation have made reasonable bids.

Any English newspaper published at least six times a week is entitled to file its bid to be the official newspaper of the city.

Citations:

Ordinances: Code '31: 680, 684.

MERGER OF OFFICIAL NEWSPAPER OF CITY

(No. 7801—City Comptroller—L. H. November 7, 1932—3 pp.)

Where the official newspaper of the city has merged with another paper, and the consolidated newspaper has all the qualifications necessary to make it a lawful medium for carrying out the city's advertising, and where the old name has not been entirely dropped, city advertisements published in the merged newspaper are legal.

Citations:

Ordinances: Code '31: 680-90.

PUBLICATION OF NOTICES IN CHICAGO JOURNAL OF COMMERCE

(No. 7839—Mayor—L. H.—December 15, 1932—1½ pp.)

The Chicago Journal of Commerce is a paper of general circulation within the meaning of the statute requiring legal notices to be published in a newspaper of general circulation.

Citation:

Reference: 17 Op. Corp. Counsel 484.

Opinion No. 7894 of January 11, 1933, to the City Comptroller is in accord with the above opinion.

LEASING CITY PROPERTY WITHOUT BIDS

(No. 8456—Mayor—J. F. G.—July 9, 1934—2 pp.)

Although it is clear that the legislature intended to authorize a lease from the city for a term of less than twenty years without notice and advertising for bids, careless legislation has made this result doubtful.

Citations:

Statutes: SH '33, 24: 513.

Ill. Laws (1931), pp. 231, 373.

READVERTISING FOR BIDS

(No. 7617—Commissioner of Gas and Electricity—L. H.—June 21, 1932—2 pp.)

The Commissioner of Gas and Electricity may readvertise for bids for residential lamps and fixtures, if previous bids have been thrown out, as the ordinance establishing a Bureau of Central Purchasing in the Department of Public Works does not go into effect until it has been published ten days.

It is necessary to advertise only three days when readvertising for bids.

Citation:

Ordinance: Coun. J. (1932-33), p. 2413 (Bureau of Central Purchasing ord.).

(3) Construction of Contracts

CITY'S LIABILITY UNDER CONTRACT OF QUESTIONED LEGALITY

(No. 7161—Commissioner of Health—J. F. G.—October 2, 1931—8 pp.)

Where the city has accepted the benefits of work done under an order of the Commissioner of Health requesting a particular corporation to remove dead animal bodies from the streets and alleys of the city, when such corporation's contract with the city relating to the same subject matter was being litigated in the courts, the city cannot refuse to pay the reasonable value of such services rendered in good faith on the ground that no bids were taken for this work.

The city is liable for services rendered under a contract illegally made, and if the contract is held legal, the city would be liable under the contract even though it had made a new contract with another party.

Citations:

Ordinances: Code '31: 90, 3932.

Cases: *Consumers Co. v. Chicago*, 313 Ill. 408 (1925).

McGovern v. Chicago, 281 Ill. 264 (1918).

Avery v. Chicago, 345 Ill. 640 (1932).

OPINION OF FOREGOING SYNOPSIS

We have your letter of August 24, 1931, transmitting photostatic copy of correspondence from the Department of Health, dated November 19, 1929, addressed to the Mid West Securities and Trading Company, also photostatic copy of letter transmitting bill of Mid West Trading and Securities Corporation, dated August 20, 1931, for services from November 19, 1929, to August 19, 1931, for \$122,499.93.

The contract between the city and the Mid West Trading and Securities Corporation for removal of dead animals, etc., at the rate of \$70,000.00 per annum is the subject of litigation now pending in the Supreme Court of Illinois.

On November 19, 1929, the Commissioner of Health of the City of Chicago addressed the president of the Mid West Securities and Trading Company and said that an emergency existed, created through the invalidation of the contract referred to, and, in order to protect the public health, the Commissioner of Health requested the company to continue the removal of dead animals from the streets and alleys of the City of Chicago until the emergency was relieved. Further notification concerning this matter was promised by the Commissioner of Health "as soon as time permits, which will be within the next twenty-four hours", when the matter was to be taken up with the finance committee of the City Council. There is no record of any further action by the finance committee of the City Council or by the City Council.

The Mid West Trading and Securities Corporation, however, caused the work to be performed, under the order of the Commissioner of Health dated November 19, 1929. The bill is for the period beginning November 19, 1929, and ending August 19, 1931, at the rate of \$5,833.33 per month, which is the same amount provided for in the contract in litigation.

The appropriation ordinance for the year 1929 provided a sum of \$105,000.00, in account 60-L-2, for removal of dead animals (including unpaid

liabilities). In 1930 an appropriation in the amount of \$35,000.00, in account 60-L-2, for removal of dead animals was passed. The appropriation ordinance for the year 1931 provided a sum of \$70,000.00, in account 60-L-2, for the same purposes from July 1, 1930, to July 1, 1931.

There is no question regarding the character of the services rendered. The City of Chicago accepted the benefits thereof over a long period of time without objection and under specific appropriations for that work passed by the City Council.

Assuming that the contract between the city and the Mid West Trading and Securities Corporation, which extended over a period of five years from July 12, 1928, will be held void by the Supreme Court of Illinois, is the corporation entitled to compensation from November 19, 1929, on a basis of the reasonable value of such services within the amount of the appropriation?

The ordinances of the City of Chicago provide (Sec. 90 Revised Chicago Code of 1931) that all contracts, let by any officer of the city in excess of \$500.00, shall be let to the lowest responsible bidder, after advertising the same. By section 3932 of said code, the Mayor and Commissioner of Health are authorized and empowered to advertise for and to receive bids or proposals for the removal of dead animals from the streets and public places of the city for a period of not more than five years.

Notwithstanding the provisions of the city code above referred to, we are convinced that the city cannot rely upon the fact that no bids were taken to avoid payment for the reasonable value of the services rendered in good faith by the Mid West Trading and Securities Corporation.

It would have been precarious for the city to have advertised at the time for bids, in view of the fact that there was an outstanding contract with the Mid West Trading and Securities Corporation which was of doubtful validity and which the courts have not yet finally passed on. In case a bid were accepted, pursuant to advertisement, and the contract awarded to someone other than the claimant and, upon final judgment, the contract between the city and the Mid West Trading and Securities Corporation were held to be binding, the city would probably be liable to that company on account of its contract even though the work had been done by another and the city had paid for such work. The only practical solution of the problem which faced the Commissioner of Health at the time and in the circumstances was to permit the Mid West Trading and Securities Corporation to continue with its work upon the understanding that the company would be paid for the reasonable value of its services out of the appropriations made for that purpose.

A contract which is within the power of the city to make, but which has been irregularly or illegally made, is not void. The courts distinguish between contracts which are *ultra vires* and contracts which are irregularly entered into. That the City of Chicago has the power to contract for the removal of dead animals from its streets and alleys cannot be seriously questioned (*Consumers Co. v. City of Chicago*, 313 Ill. 408). In *McGovern v. City of Chicago*, 281 Ill. 264, the city had advertised for bids for the repairing of pavements announcing that no bid would be accepted which did not contain a reasonable price for every item. The city nevertheless accepted such a bid and, after the work had been satisfactorily performed and accepted, an action was brought to recover for an unpaid balance for work and materials furnished. It was held that the city could not avoid the contract because the bid was unbalanced and was estopped to allege its invalidity because the time of execution provided therein extended beyond the fiscal year for which the appropriation for such work was made, which was not according to the advertisement for bids.

We believe that the case cited is analogous to the case under consideration. In its worst aspect, the order of the Commissioner of Health, dated November 19, 1929, requesting the Mid West Securities and Trading

Company to continue the removal of dead animals from the streets and alleys of the City of Chicago, was the basis of a contract irregularly made; and the city, having accepted the benefit of the work done under that order, cannot avoid the contract on the ground of irregularity for want of bids.

However, in the pending case of *Avery v. City of Chicago*, the Supreme Court held in its opinion of February 18, 1931 (now under reconsideration by the court upon petition for rehearing), that the Mid West Trading and Securities Corporation is without charter power to enter into a contract of the nature of that based upon the order of the Commissioner of Health dated November 19, 1929. It appears in the record of the case pending that the actual work of removing dead animals from the streets and alleys of the city was performed by the Municipal Western Removal Company, and we are informed that the same company continued under the informal order of November 19, 1929.

There is no doubt that someone is entitled to some compensation for the work done under the order of November 19, 1929, despite the fact that the order of the Commissioner of Health was not formally approved by the City Council, as suggested in the letter. The only question that is in doubt is the amount of money which shall, at this time, be paid for that work.

* * * * *

Liability Under Invalid Contract: The statute which authorizes the city to contract for a period exceeding one year for the disposition of "garbage" does not authorize a five-year contract for the removal and disposition of dead animals.

The contract entered into between the city and the Mid West Trading and Securities Corporation to provide for the removal of dead animals and condemned meat for a five-year period, being invalid only as to time, is unenforceable as to the executory but not the executed portion of it, the city having enjoyed the benefits for nine months.—*Avery v. Chicago*, 345 Ill. 640 (1931).

ALTERATIONS IN CONTRACT TERMS

(No. 7436—*State's Attorney—C. J. A.—February 1, 1932—4 pp.*)

The Commissioner of Gas and Electricity can alter minor details of a contract to save the city expense but a change in the essential parts of the contract amounts to the making of a new contract and that only the City Council can authorize.

Alterations which involve the expenditure of additional money by the city, or the omission of essential work and material without a corresponding reduction in price would amount to the making of a new contract.

Citations:

Ordinances: Code '31: 228, 455.

Cases: Lake Shore and Michigan Southern Ry. Co. v. Chicago, 144 Ill. 391 (1893).

Pells v. City of Paxton, 176 Ill. 318 (1898).

Littler v. Jayne, 124 Ill. 123 (1888).

Sanitary District of Chicago v. Lee, 79 Ill. App. 159 (1898).

(The original opinion of the foregoing synopsis is reproduced on the following pages.)

OPINION OF FOREGOING SYNOPSIS

We have your letter of the 22nd ultimo in which you ask:

"Has the Commissioner of Gas and Electricity any legal right to change the plans and specifications of a contract properly executed on behalf of the city, to the detriment of the city, in that the work and material provided by the contractor would be considerably lessened, without first submitting the proposed changes to the City Council for approval and adjusting the compensation accordingly?"

To this abstract question we can only answer in general terms, stating what we believe to be the general rule. The application of such rule to a given case, however, may depend somewhat upon the language of the contract in that case and the ordinance authorizing the same.

Section 228 of the Code of 1931, to which you refer, relates more especially to the Commissioner of Public Works, but it also purports to include "any other officer of the city." In addition thereto, section 455 of the code provides that the Commissioner of Gas and Electricity shall let contracts in the same manner as is provided for the letting of similar contract in the Department of Public Works. * * *

The very fact that the law requires a contract to be let to the lowest responsible bidder would ordinarily imply that there can be no fundamental change in the contract after it has been let, since that would nullify the very purpose of requiring competitive bidding.

L. S. & M. S. Ry. Co. v. Chicago, 144 Ill. 391.

Pells v. City of Paxton, 176 Ill. 318.

Little v. Jayne, 124 Ill. 123.

Sanitary Dist. of Chicago v. Lee, 79 Ill. App. 159.

In the matter of minor details, or of "extras," it is customary for municipalities to insert in the contract, and in the ordinance authorizing the same, a provision reserving the right to make minor changes and alterations. Thus we find in the forms of contracts used by the Department of Gas and Electricity provisions like this:

"The Commissioner of Gas and Electricity reserves the right to make any changes in the specifications and plans, or in the order in which work shall be performed, which may be deemed necessary, either before or after beginning work of construction under this contract, without invalidating this contract, provided the general character of the work as a whole is not changed thereby. If such alteration increases the quantity of the work to be done, such increase shall be paid for at the unit price established under its contract for each class of work actually performed. If such alteration diminishes the quantity of the work to be done, it shall not constitute a claim for damages or for loss of profits on the work that may be dispensed with, and the City of Chicago shall not be required to pay for work or material omitted."

You will note that, under the sections of the code quoted above and a reservation in the contract like that last above quoted, the Commissioner of Gas and Electricity has a certain limited power to make alterations in a contract after it is let. There are certain restrictions, however. If such alterations will involve the expenditure of any additional money by the city, the commissioner must first report to and obtain the consent of the City Council to the proposed alteration. On the other hand, if the commissioner can, without detriment to the work, save money for the city by omitting a few unnecessary details, the ordinance, as we understand it, permits him to do that without consulting the City Council.

In your letter you speak of alterations which would be:

"to the detriment of the city, in that the work and material provided by the contractor would be considerably lessened."

If the omission does in fact constitute a detriment to the city, that is

to say, if it is not merely the omission of unnecessary details made for the purpose of saving expense to the city, but is actually the omission of some essential part of the work, we would say that the commissioner had exceeded his powers in making such alterations in the contract; for a change in essential would amount to the making of a new contract, which only the City Council can authorize. Moreover, if essential work and material is omitted without making a corresponding reduction in price, that would amount to increase the expense of the contract which section 228, *supra*, forbids.

The above constitutes in our opinion a correct statement of the general rule of law on this subject. Not knowing, however, what specific state of facts you have in mind, we must leave it to your judgment to apply the law to the particular facts as you may deem proper.

* * * * *

CHANGE OF CONTRACT PROVISIONS*

(No. 7705—Commissioner of Police—L. H.—August 9, 1932—2½ pp.)

Any alterations of the payment provisions of the contract between the police department and the Institute of Public Administration must be authorized by the City Council and agreed to by the Institute before such changes will be binding upon both parties to the contract.

EFFECTIVE DATE OF CONTRACT AUTHORIZED BY CITY COUNCIL

(No. 8195—Commissioner of Public Works—C. N.—October 20, 1933—3 pp.)

The earliest date at which a contract with the city authorized by the City Council could be deemed "entered into" is the actual date of the contract or, at most, the date of authorization by the City Council.

ALLOWANCE FOR UNFORESEEN EXPENSES UNDER CONTRACT

(No. 6527—Chairman, Finance Committee—J. L., E. C. H. and J. G. D.—October 22, 1929—6½ pp.)

The city cannot allow the claim of a contractor for additional compensation for unforeseen work arising from the abnormal height of the Chicago river where the contractor was working for a set price

*See also Opinion No. 7821, p. 848.

under a contract expressly forbidding added compensation for extra work or unforeseen contingencies.

Citations:

- Cases:** Chicago v. Weir, 165 Ill. 582, 591 (1897).
Day v. United States, 245 U. S. 159 (1917).
The Kronprinzessin Cecilie, 244 U. S. 12 (1917).
Carnegie Steel Co. v. United States, 240 U. S. 156, 164 (1916).
Globe Refining Co. v. Landa Oil Co. 190 U. S. 540, 513 (1902).
Chicago Milwaukee & St. Paul Ry. v. Hoyt, 149 U. S. 1, 14 (1893).
Other references: 5 McQuillin, Mun. Corp. (2nd ed.), p. 416.
Op. Corp. Counsel (1916), p. 162.
Id. (1919), p. 680.
Id. (1926), p. 727.
Bouvier's Law Dictionary, "additional."
Words and Phrases, "additional."

City Council Authorization of Additional Work: A provision in a contract between a city and a dredging company requiring specific authorization from the City Council for making alterations which would increase the expense of the work does not apply to additional work authorized by the Commissioner of Public Works and made necessary by the unusual rise in the water level of Lake Michigan where authorization would have necessitated a delay costly to the city; when the city does not object to the additional work and accepts its benefits it is held to have ratified it.—Great Lakes Dredge Co. v. Chicago, 353 Ill. 614 (1933).

OPTION TO EXTEND CONTRACT

(No. 8361—Commissioner of Public Works—L. H.—April 9, 1934—
2½ pp.)

Where a contract gives the city the option to extend the contract for a period not to exceed ninety days beyond the date of its expiration, the option relates only to the city's right of extension and the contractor has no privilege of accepting the extension, increasing the rates or otherwise changing the terms of the contract; also the contractor is bound to perform the contract during the extension period under the same terms as originally agreed upon.

PURCHASE OF ADDITIONAL AMOUNTS UNDER CONTRACT

(No. 8027—City Clerk—Jud. G.—April 21, 1933—2 pp.)

Under a contract providing for a given number of brass plates and badges at a certain total price and for the purchase of additional brass plates and badges at a fixed price per plate or badge, the City Clerk may order additional plates and badges as he needs them, and issue vouchers for them to an amount not in excess of the City Council's appropriation without advertising for bids and entering into a new contract.

ADDITIONAL PURCHASES AFTER CONTRACT SUPPLY FURNISHED

(No. 8561—*Commissioner of Public Works—Jud. G.—November 15, 1934—1½ pp.*)

Where a contract for supplies to the city specifies the unit price and the total amount to be expended under it, no further deliveries can be enforced under the contract after the cost of the supplies delivered at this price equals this total amount, even though the city exercises its right to extend the term of the contract. If the contract is extended, the City Council may authorize the approval of prices in excess of the contract price, but not exceeding the market price at the time of the delivery.

PAYMENT OF CONTRACT WHEN DEVIATIONS OCCUR

(No. 8809—*Commissioner of Public Works and Acting Commissioner of Streets and Electricity—Jud. G.—July 5, 1935—18 pp.*)

While a person who wilfully or purposely neglects or fails to perform a contract made by him cannot recover anything for partial performance, yet where he in good faith performs the work contracted by him in a manner not prescribed by the contract and the city sanctions or accepts the work, he may recover for the work done and the materials furnished, the city being able to recoup for damages through any deviations not introduced by it.

Citations:

- Cases: Keller v. Herr, 157 Ill. 57, 60 (1895).
Gillespie Tool Co. v. Wilson, 123 Pa. 19 (1888).
Douglas v. City of Lowell, 80 N. E. 510 (Mass., 1907).
Snouffer and Ford v. City of Tipton, 142 N. W. 97 (Iowa, 1913).
Wright v. Barber, 113 Atl. 200 (Pa., 1921).
Estep v. Fulton, 66 Ill. 467 (1872-73).
Robinson Construction Co. v. Barry, 108 Atl. 688 (Md., 1919).
Bond v. Mayor of Newark, 19 N. J. Eq. 376 (1869).

DESIGNATING CONTRACTOR AS AGENT OF THIRD PARTY

(No. 8521—*Commissioner of Public Works—O. W. H.—October 15, 1934—2 pp.*)

A contract with the city should eliminate the designation of the supplying company as an agent for a third company since this destroys the liability of both the agent company and its surety.

DEFAULT BY CITY IN INSTALLMENT PAYMENTS

(No. 8140—*Commissioner of Public Works—J. F. G.—August 9, 1933*
—4½ pp.)

Under a contract providing for periodic payments by the city for work already done, the contracting company has a right to suspend work if the city fails to make such periodic payments and it may collect the full value of work done and profits on the uncompleted work without any deduction under the time charge provision in the contract as the non-payment by the city suspends the time charge liability.

**BINDING EFFECT OF CONTRACT WHEN REQUIREMENTS
CHANGE—REMOVAL OF LAMP-POSTS**

(No. 7177)—*Commissioner of Gas and Electricity—L. J. D.—October 8, 1931—2 pp.*)

A contract for disconnecting, removing and hauling each gas lamp-post which is based on only one post varies so much from the existing requirement of the removal of 4800 posts that such contract is not binding on the city for the removal of these 4800 posts.

**RESERVING PERCENTAGE OF PAYMENT ON CONTRACT—
TRANSPORTATION OF CHARGES**

(No. 8074—*Commissioner of Public Works—L. H.—May 20, 1933—3 pp.*)

The reservation by the city of fifteen per cent on the amount due on a contract for coal until the completion of the contract should apply only to the portion of the voucher covering the value of the coal. The portion of the voucher covering the cost of transportation should be paid in full to the railroad company.

Citations:

Ordinances: Coun. J. (1932-33), p. 3341.
Coun. J. (1933-34), p. 196.

**OBLIGATION TO PURCHASE WHEN NO AMOUNT SPECIFIED
IN PROPOSAL**

(No. 8333—*Superintendent, Bureau of Central Purchasing—E. L. M.—March 16, 1934—3 pp.*)

According to the terms, language and provisions of the Conway Company proposal, the city is not legally bound to make further pur-

chases of modified asphaltic concrete from the R. F. Conway Company or its assigns, if in the opinion of the Bureau of Streets, the best interests of the city do not justify these purchases, as there is no provision for a specified amount but only an offer to supply so much per day if and when ordered.

ADDITION OF SALES TAX TO CITY CONTRACTS AFTER AWARD

(No. 8221—*Superintendent, Bureau of Central Purchasing, Department of Public Works—L. H.—November 20, 1933—4½ pp.*)

The Illinois Retailers' Occupation tax cannot be added to the price of a contract after the city has awarded the contract, unless there is some provision in the contract for additions to the original contract price.

Citations:

Administrative rules: Ill. Dept. of Finance, Rules and Regulations concerning Retailers' Occupation Tax act (issued June 30, 1933, and Sept. 2, 1933).

Other reference: Opinion No. 8179 (this volume, p. 846).

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of October 20, 1933, relative to the charge for the Illinois retailers' occupation tax on the bills of wholesale grocers.

The tax items added to the bills specified by the following language:

"Addition to purchase price on account of increased cost due to Illinois occupation tax."

In a former opinion rendered to the Commissioner of Public Works on September 23, 1933, in passing on the question of whether the dealer was justified in charging this tax against the city, we pointed out that the tax in question was a tax on the dealer and not on the consumer—that while the law permitted the dealer to take the tax into account in fixing his price to the consumer, he was not a tax collector and could not charge the tax to the consumer as a separate item.

The view thus expressed by us was upheld by the rules of the Illinois Department of Finance, which embodied the same in a printed bulletin of general and special rules and regulations relating to the Retailer's Occupation Tax act published by said department under date of June 30, 1933.

The gist of this ruling was that it was lawful for the vendor to include an extra amount in his selling price designed to reimburse him for the tax, but if he failed to so include the extra charge in his selling price he had no right to set himself up as a tax collector and exact the tax from the consumer as a separate charge against the consumer. Thus, it will be seen that the ruling was against the manner of shifting the tax to the consumer rather than against the passing on of the tax, which could lawfully be done by adding it to the sales price.

While our written opinion was based on our own interpretation of the law, nevertheless we considered it proper to refer to the bulletin of June 30th and say that our opinion was in harmony with the ruling of the Illinois Department of Finance, and we quoted from a footnote appended to the rules and regulations of that department.

Since that opinion was sent to the Commissioner of Public Works, the Illinois Department of Finance has seen fit to change its ruling with respect to the technical feature in question. Under date of November 2, 1933, it issued a bulletin which contained the following as a sort of caption:

"A retailer may advertise to his clientele that his base prices are subject to a two per cent increase on account of the increased cost of doing business under the Retailers' Occupation Tax act and may add this amount by way of a separate item."

Underneath this caption, and in explanation thereof, the following appeared in said bulletin:

"While it is true that the Illinois Retailers' Occupation Tax act imposes a tax liability upon merchants and not upon consumers, there is nothing contained in the law which prohibits the merchant from shifting the tax burden thereby imposed to his customers. This he may do by increasing the price of the commodities which he sells.

"To accomplish this end he may increase unit prices or he may advertise to his clientele that his base prices are subject to a two per cent increase on account of this additional cost of doing business. In the latter event, it is not improper for him to add this additional amount by way of a separate item, provided that this separate item is properly identified as a part of the selling price, and is in the proper amount. It is improper for a retailer to represent to his customers that they are paying a so-called 'sales tax' to the State, or that he is acting as agent for the State in collecting a tax from them."

While the new ruling is merely a new interpretation placed upon the language of the act and does not change the law, nevertheless, since the former ruling and our original opinion went to the form or method of passing on the tax to the consumer rather than to the substance of the matter, we would be inclined to follow the ruling of the State Department of Finance in regard to the bills in question if another factor did not enter into the matter. This is the fact that competitive bids were taken by the city before the contract for the commodities furnished by the company was awarded to that concern.

In making its bid the company made no mention of any tax or the possibility of an additional charge of this kind. It entered into the competition with others, and its bid left it no opening for the increasing of the price at some subsequent date by the addition of the sales tax. As stated by you in your letter, if it was intended that the tax should be added "it would seem that they should have taken this into consideration when making quotations to the City of Chicago."

As the matter stands, the quotations were made after the act was in effect, the bid was accepted and the contract awarded thereon, and to permit any addition thereto at this time would be to destroy the very basis of the competitive letting of contracts.

It would not be lawful to allow the successful bidder after he is awarded the contract to increase his bid even though the increase represents a tax which the bidder inadvertently overlooked. Therefore, we must hold it to be the law that the company in question cannot now add the tax to the prices that it quoted which were accepted by the city.* * *

* * * * *

Opinions No. 8153 of August 24, 1933, and No. 7998 of April 6, 1933, both to the Commissioner of Public Works, and Opinion No. 8003 of April 6, 1933, to the City Comptroller are all in accord with the above opinion.

LIABILITY FOR SALES TAX ON PURCHASES

(No. 8150—*Board of Local Improvements*—A. A. S.—August 21, 1933—1½ pp.)

The sales tax falls upon retailers and as the city is in the position of a consumer it is not subject to such tax but merely to the purchase price specified in its contracts, whether such contract was made before or after the enactment of the sales tax.

Citation:

Statute: SH '33, 120: 441.

SALES TAX ON SUPPLIES TO CITY

(No. 8112—*City Comptroller*—L. H.—July 12, 1933—3 pp.)

Where a person has agreed to furnish certain tangible personal property at a stipulated price to the city, he cannot add any portion of the Retailers' Occupation tax to his price, but he may take the tax into consideration as an element of his costs and set his price to the city accordingly.

Citation:

Statute: Retailers' Occupation Tax act, secs. 12, 14.

**CHANGE OF PRICES ON CONTRACTS AWARDED BEFORE
SALES TAX**

(No. 8017—*Commissioner of Public Works*—L. H.—April 15, 1933—5 pp.)

The city is not required to pay more than the price contracted for on any purchase, despite the passage of the sales tax law.

A foreign concern must pay a sales tax on goods actually sold in Illinois but not on goods which are purchased and sold in another state and merely delivered in Illinois.

The prices in contracts made prior to the passage of the sales tax act can be changed only with the consent of the City Council.

The city must pay a contract price which includes the sales tax, even though the sales tax act failed to pass.

EFFECT OF INVALIDATION OF SALES TAX ON CONTRACT

(No. 8179—*Commissioner of Public Works*—J. F. G.—September 23, 1933—3 pp.)

Where a contract for the supplying of certain goods to the city provided a specific reduction in price to the city if the three per cent state sales tax was held not applicable, the city is entitled to such

reduction after the three per cent sales tax had been invalidated even though a two per cent sales tax was subsequently enacted.

Citations:

- Administrative rule: Ill. Dept. of Finance, Rules and Regulations on Retailers' Occupation Tax act, p. 4 (footnote).
Case: Winter v. Barrett, 352 Ill. 441 (1933).

FEDERAL EXCISE TAX ON GOODS SUPPLIED CITY*

(No. 8914—City Comptroller—M. H. F.—November 7, 1935—4 pp.)

The City Comptroller may deduct the amount of the Federal Manufacturers' Excise tax from all invoices rendered for goods delivered to the city after October 1, 1935, when the contracts provide that the prices named in them include federal taxes, except when it is the intent of the parties that title should pass to the buyer at the time the contracts were made.

The City Comptroller may require sellers to furnish affidavits in support of their invoices to show whether the federal excise taxes have been paid.

Citations:

Statute: ISBS '35, 121a: 17, 18, 19.

Administrative rule: United States Treasury (Bureau of Revenue) Regulations, Regulation 46, art. V.

LIABILITY OF CITY FOR PROCESSING TAX ON COTTON

(No. 8155—Superintendent, Bureau of General Purchasing, Department of Public Works—J. F. G.—August 25, 1933—3 pp.)

Processors selling cotton to the city may pass the processing tax on to the city, unless the contract governing the purchases prohibits the addition of the tax.

Citation:

Statute: United States Agricultural Adjustment act, secs. 2, 9(a, d), 16(b), 18.

LIABILITY FOR INCREASED FREIGHT RATES

(No. 7952—Chairman, Committee on Finance—C. N.—February 21, 1933—3 pp.)

The city is not required to pay any sum in excess of the price stipulated in the contract because of an increase of the freight rate paid by the contractor, since there is no provision in the contract for an increase in the price to be paid because of an increase in freight rates, and since the contractor undoubtedly knew when he signed the contract that a rate increase was pending.

*See "Note Concerning Federal Excise Tax," p. 12.

**VARIATION BETWEEN SERVICES AND RECORD OF SERVICES
UNDER CONTRACT—TELETYPE MACHINES**

(No. 7468—*Commissioner of Police—L. H.—March 2, 1932—2½ pp.*)

The city is bound under its contract to pay for the number of teletype machines in operation, regardless of whether the records of the corporation that rented them to the city were correct or not.

CONTRACT FOR 106TH STREET BRIDGE OPERATOR'S HOUSE

(No. 6655—*Commissioner of Public Works—R. N. L.—April 28, 1930—11½ pp.*)

The Ralph H. Simpson Company under the contract of February 27, 1928, is not entitled to extra compensation from the city for delays in the construction of operators' houses on the 106th Street bridge.

CONTRACT WITH INSTITUTE OF PUBLIC ADMINISTRATION

(No. 7821—*Commissioner of Police—L. H.—November 28, 1932—3 pp.*)

Under the terms of the contract with the Institute of Public Administration, allotments for salaries during the two periods must be regarded as appropriations for those periods which cannot be altered by the head of the department, but which the City Council may vary to an extent that does not call for an increased appropriation.

Citation:

Reference: Opinion No. 7705 (this volume, p. 840).

(4) *Liens Against Contractor*

PRIORITY OF RETAINER'S CERTIFICATE OVER SUBCONTRACTOR'S LIEN

(No. 8867—*City Comptroller—A. A. S.—September 9, 1935—4 pp.*)

A retainer's certificate, evidencing funds withheld by the city from a contractor to secure itself against improper workmanship is an evidence of indebtedness as contemplated by section 23 of the Liens act and liens for furnishing materials for public improvements are subordinate to such retainer's certificate.

Citation:

Statute: SH '35, 82: 23.

MECHANICS' LIENS ON TEAMING CONTRACTS

(No. 6929—City Comptroller—C. J. A.—June 4, 1931—2 pp.)

A contract to do general teaming is not a contract for a permanent public improvement, and so does not come within the terms of the statute subjecting contracts for public improvements to mechanics' liens.

Citations:

Statute: SH '29, 82: 23.

Cases: Fehr Construction Co. v. Postl System, 189 Ill. App. 519 (1915).
Alexander Lumber Co. v. Champaign Baseball Club, 201 Ill. App. 246 (1917).

MECHANICS' LIEN ON TEAMING CONTRACTOR

(No. 6931—C. J. A.—June 5, 1931—2 pp.)

One engaged in removing rubbish in teams and wagons furnished by him is a *contractor* rather than an *employee*, but is not a contractor having a contract for a public improvement and therefore is not subject to a mechanics' lien.

Citation:

Statute: Mechanics Lien act, sec. 23.

SUBCONTRACTOR'S CLAIM AGAINST CITY—MECHANICS' LIEN AGAINST PUBLIC IMPROVEMENTS

(No. 7999—City Comptroller—C. H. L.—April 6, 1933—5½ pp.)

A subcontractor, who furnished labor and materials to a firm that performed work for the city should look to that firm for the payment of claims against it and not to the city.

A public improvement, which may be subjected to a mechanics' lien, must be a permanent improvement and an improvement on real property.

Citations:

Statute: SH '31, 82: 23.

Cases: Chicago v. Hasley, 25 Ill. 485 (1860-61).
Merwin v. Chicago, 45 Ill. 133 (1867).
Alexander Lumber Co. v. Champaign Baseball Club, 201 Ill. App. 246 (1917).

B. SURETY BONDS

COMMISSIONER OF PUBLIC WORKS' ACCEPTANCE OF BLANKET BOND

(No. 8830—*Commissioner of Public Works—O. W. H.—July 26, 1935—4 pp.*)

A blanket bond covering all specific bonding requirements, present and future, under all ordinances, present and future, should not be accepted by the Commissioner of Public Works for present and future privileges and permits granted by the city as there would be no acceptance by the surety of the conditions and requirements laid down in ordinances passed afterwards by the City Council and accepted by the principal. Also legal and bookkeeping difficulties are raised and small property owners or corporations are placed at a disadvantage.

COMMISSIONER OF PUBLIC WORKS' DISCRETION IN ACCEPT- ANCE OF SURETY BONDS—CONTRACT AWARD BY MANDAMUS

(No. 7891—*Commissioner of Public Works—L. H.—January 9, 1933—2 pp.*)

The Commissioner of Public Works has a right to refuse to accept surety bonds from a company which, in his judgment, does not meet financially the status that he insists upon.

Mandamus will not lie to compel an officer to give a contract to any particular concern but lies only to compel an officer to do something which the law explicitly requires.

REQUIRING CORPORATE SURETIES

(No. 8854—*C. N.—August 21, 1935—1½ pp.*)

The Commissioner of Public Works is fully authorized to insist upon corporate rather than personal sureties.

Citation:

Ordinance: Code '31: 865.

REQUIRING CORPORATE SURETIES—PAWNBROKERS LICENSE BOND

(No. 7047—*Mayor—J. F. G.—July 31, 1931—1 p.*)

The Comptroller, in accepting pawnbroker's license bonds, may require, in his discretion, bonds of corporate sureties regularly qualified

to execute surety bonds, except in the rare cases where the personal surety offered is widely known as one ready and able to make good the amount of his obligation.

Citation:

Ordinance: Code '31: 2905.

CONTRACTOR'S SURETY BOND TO COVER SUB- CONTRACTOR'S LIEN

(No. 7812—City Comptroller—E. R. D.—November 18, 1932—2 pp.)

The city cannot accept a surety bond from the general contractor to cover a subcontractor's lien unless the procedure prescribed by statute is followed.

Citation:

Statute: SH '31, 82: 23.

LIABILITY OF TRUSTEE ON SURETY BONDS

(No. 8742—Commissioner of Public Works—O. W. H.—April 12, 1935—1 p.)

The city cannot require a trustee to assume a greater liability than that which exists.

The city can accept driveway or similar bonds bearing a rider in which a trustee limits his liability as trustee and not personally, if the city is amply protected in the bonds by the additional protection of a surety company satisfactory to the city.

PAYMENT OF INTEREST ON COLLATERAL SECURITY DEPOSITED WITH CITY

(No. 6707—City Comptroller—P. B. P.—July 7, 1930—2 pp.)

Interest on bonds deposited as security for a paving construction contract may be paid to the assignee without the express written consent of the assignor and owner where the assignment gave the assignee a power of attorney to receive the interest on the bonds and give a receipt for it.

As a matter of policy, the assignor should be requested to consent in writing to each interest payment.

RE-INSURANCE OF SURETY TO CITY

(No. 7151—*City Comptroller—M. H. F.—September 28, 1931—2½ pp.*)

A re-insurance contract is merely one of indemnity of the first insurer against the risk which it has already assumed, and it creates no privity of contract between the re-insurer and the city insured.

Therefore, to protect the city, the re-insurer should be made a co-insurer with the original surety, or an additional bond should be taken for the excess not covered by the re-insurer.

RELEASE OF SURETY RETURNING STOLEN BONDS

(No. 8625—*Comptroller—M. H. F.—January 12, 1935—2 pp.*)

The release of a surety on an indemnity bond given to the city, can be done, if at all, only by the City Council.

Where a surety company for duplicates of stolen city bonds, returns the stolen bonds to the city, the Comptroller may furnish the company with a writing, acknowledging their receipt and stating that the city will not look to it for protection in case of any liability arising after the return of the bonds to the city.

LIABILITY OF SURETY OF OFFICIAL NEWSPAPER BEYOND CONTRACT YEAR

(No. 7925—*City Comptroller—L. H.—February 2, 1933—2 pp.*)

In the absence of an express provision, the bond of the official newspaper for one year does not continue in force until the official newspaper for the succeeding period is selected, and the surety company can no longer be looked to for indemnity in case there is not a proper performance after the expiration of the contract year.

Citations:

Ordinances: Code '31: 685-686.

CANCELLATION OF SURETY BOND BY SURETY COMPANY

(No. 8296—*Superintendent, Bureau of Compensation—O. W. H.—February 14, 1934—1½ pp.*)

A surety company has not the power to cancel a bond unless a substitute surety company is provided and accepted by the city or the conditions which the bond covers can be and are abrogated.

DISCHARGE OF SURETY ON CONTRACTS

(No. 7935—*Commissioner of Public Works—C. N.—February 8, 1933*
—4 pp.)

To release a surety company from liability on a public contractor's bond because of departure from the terms of the contract, the departure must be in material matters.

Other than special statutory or ordinance requirements, contracts of the city are subject to the same rules of construction that apply to contracts of private corporations.

Where the contract provides that no part of the work shall be sub-contracted without the written consent of the Commissioner of Public Works, the surety bond in question will not be materially affected by the commissioner's approval of a subcontractor.

Citations:

Cases: *Bergen Beach Land Corp. v. New York*, 185 N. Y. S. 177 (1920).
Chicago v. Dee, 218 Ill. App. 476 (1921).
Philadelphia v. Fidelity and Deposit Co., 46 Pa. Super. Ct. 313 (1911).

Other reference: 5 McQuillin, *Mun. Corp.* (2nd ed.), sec. 2113.

RELEASE OF SURETY—PROTECTION AGAINST INSOLVENT SURETY

(No. 8200—*Superintendent of Compensation—O. W. H.—November 2, 1933—1½ pp.*)

The city cannot be used as an agency to assist surety companies in being released from unexpired obligations.

When the city receives notice from a competent court or from the proper department of any state handling such matters that a surety company is insolvent, it should take steps to obtain proper surety protection.

RELEASE OF SURETY

(No. 7875—*City Comptroller—O. W. H.—January 3, 1933—1½ pp.*)

Under the terms of the bond, the Fireman's Fund Indemnity Company cannot be released from its obligation. There is no provision in the bond giving the surety company the option to terminate the bond until the end of the year provided in the bond. Further, the bond provides that in the event of default on the part of the principal, the city shall immediately notify the surety in writing and within three months furnish the surety with affirmative proof of loss.

CHAPTER XIV

LOCAL IMPROVEMENTS

INTRODUCTORY

The words "local improvement" carry the basic thought that a permanent improvement is to be constructed of special benefit to the property of a particular area and, hence, the costs thereof will be borne in whole or in part by that property.

The first step in carrying out a local improvement is the passage of a resolution by the Board of Local Improvements describing the improvement. After this an ordinance is prepared by the board and is submitted to, and passed by, the City Council. The Board of Local Improvements also plays a major role in executing, as well as in initiating the improvement.

Once the ordinance is passed, the other step is the levying of a special assessment to pay for the improvement. If the improvement involves the taking of private property, the owner is entitled to the fair cash market value of the property taken and damages to the remainder, if any. There are also two kinds of bonds which may be issued in connection with a local improvement. One is designed to pay that part of the cost of the improvement charged against the city as a public benefit and to pay the expenses of the court and engineering and clerical help. This type of bond must be authorized by popular referendum and is a general corporate liability of the city. The other type of bond is an issue in anticipation of assessments, generally used to pay charges in connection with the improvement and payable solely from the assessments which are received by the city. These are the high-light phases of local improvements discussed in this chapter.

Under the topic of assessments the power of the city to levy special assessments and the purposes for which they may be levied are important matters. An interesting situation arises where the city itself is levied for a local improvement—in such cases, we may ask what effect this has upon the city's debt-incurring powers and what distinctions, if any, shall be made in the payment procedure. In addition, a special assessment may be offset by deductions for condemnation awards. However difficult the appraisal of property for condemnation may be, the determination of what and how much damages are attributable to a local improvement is even more perplexing. Where bonds are issued by referendum, or in anticipation of assessments, the purposes for which the issue is made or for which the

proceeds are used and the methods of redemption are important considerations.

Recent years have introduced new developments in the sphere of local improvements. Delinquencies in the payment of special assessments became more frequent. This interfered with the payment of condemnation awards, the redemption of bond issues, and the completion of the improvement. On the other hand, it brought the necessity for relieving the property owner's burdens. Some insight as to the city's method of handling these unique developments is given in the opinions which follow.

A. LEGISLATIVE AND ADMINISTRATIVE POWERS AND DUTIES

REIMBURSING PARTIES ADVANCING MONEY FOR LOCAL IMPROVEMENTS

(No. 6537—*President, Board of Local Improvements*—L. H.—November 7, 1929—4 pp.)

In protecting parties who advance money for local improvements, the city cannot give greater protection than it itself enjoys in such matters and can only repay such special assessment monies as it is able to collect.

The assigning or securing of special assessment claims against property owners is beyond the power of the city.

Citation:

Statute: Cah. '27, 24: 1001.

PRIVATE MONEY ADVANCED FOR LOCAL IMPROVEMENTS

(No. 6610 — *Commissioner of Gas and Electricity* — L. H.— March 3, 1930.—4½ pp.)

Money advanced by private parties for a public improvement which has not been authorized or appropriated for by the City Council can be accepted and used for that purpose, but the city cannot give a guarantee to those private parties that they will be reimbursed for the money so advanced.

Citations:

Ordinance: Coun. J. (1912-13), p. 2200.

Reference: Op. Corp. Counsel (1911-12), p. 1096.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of recent date relative to the proposed installation of traffic control lights on North Ashland avenue.

"The Association raises this question. 'What kind of a financial arrangement will be necessary with the City of Chicago thru the savings bank relative to the payment for the installation, and what kind of a guarantee would we have that the money would be refunded by the City of Chicago in the event a bond issue for this purpose has been successfully passed?'"

It appears from your letter that an association proposes to raise by public subscription the funds necessary for such equipment and installa-

tion. It would seem that it is then proposed to secure some kind of action by the city whereby the parties who advance the money can be reimbursed. We arrive at this by reason of the following, contained in your letter:

The advancement and the use of the money for the purpose intended may be provided for, but we apprehend that there will be difficulties about the reimbursement of the parties who advance it. This will be especially true if the intention is to secure authorization of a bond issue for that purpose. The issue of bonds for improvements that have previously been made is something that is not contemplated by the laws governing such matters. It is possible, where a bond issue for some contemplated improvement has been provided for in the regular course of events, to hurry the work of making such improvement by securing an advancement from other sources. Under such conditions reimbursement is not so difficult. But to authorize bonds for an improvement that has been completed and paid for is so far out of the ordinary course of procedure that legal complications will undoubtedly arise. If such an improvement is tied up with others and included in a bond issue covering the whole, there is danger of the entire issue being held invalid by reason of this item. The difficulties, in case the reimbursement is to be by means of an appropriation from corporate funds, would be almost as great. The law does not permit an expenditure of this kind unless an antecedent appropriation therefor has been made, and it would be hard to justify the expenditure of money for purposes of reimbursement under such circumstances.

There have been instances of improvements being made through the advancement of private funds, but there does not appear to be any such case where there was a repayment made to the parties that advanced the money except possibly one case where there was already a special assessment spread which was later on used for purposes of reimbursement. This last mentioned case is so different from what is here proposed that it is not necessary to go into the matter, and moreover it was a transaction of doubtful validity. * * *

* * * * *

The only thing that can be done, therefore, in case the fund is to be advanced, would be to take over the money, put it into a special fund in the city treasury, and to draw upon it for the purposes of the improvement when it is constructed. That is as far as the city can lawfully go.

ORIGIN OF ORDINANCE FOR LOCAL IMPROVEMENT— SUBWAY CONSTRUCTION

(No. 6719—President, Board of Local Improvements—C. J. A. and E. C. H.—July 16, 1930—7½ pp.)

The city government is divided into three distinct branches, the legislative, the executive, and the judicial, and no branch can exercise any power belonging to either of the other two.

All ordinances for local improvement to be paid for wholly or in part by special assessment or special taxation shall originate with the Board of Local Improvements; but that board may adopt such suggestions or plans as it sees fit from any other body. The City Council has no authority to originate any such ordinance for a local improve-

ment and no committee of the Council has any greater authority in that regard.

A subway is a local improvement which may be built by special assessment.

Citations:

Constitution: Illinois, art. III.

Statutes: SH '29, 24: 569c.

Local Improvement act, secs. 5, 7.

Cases: Greenfield v. Russel, 292 Ill. 392 (1920).

Saxley v. Sonneman, 318 Ill. 600 (1925).

Chicago v. Mathias, 320 Ill. 352 (1926).

Other references: Op. Corp. Counsel (1915-16), p. 454.

16 Id. 425.

Opinion No. 6628 (this volume, p. 861).

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of the 15th inst. relative to the matter of subway construction by special assessment in which you state that the local transportation committee of the City Council has been and is preparing plans for the construction of the subway and arranging to employ experts and lawyers to carry out the work. We note your further statement that you have no objections to this arrangement if it is legally unobjectionable and you request an opinion from the Corporation Counsel as to what is the extent of the powers of the Committee on Local Transportation in the matter of preparing plans for a subway and whether the Board of Local Improvements could legally adopt such plans when completed.

The local transportation committee is a committee of the City Council which is a legislative and not an executive or administrative body. The powers of the City Council are purely legislative and of course a committee cannot have any greater power than the City Council itself. Article 3 of the Constitution of Illinois reads as follows:

"The powers of the government of this state are divided into three distinct departments—the legislative, executive and judicial; and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others except as hereinafter expressly directed or permitted."

Accordingly, our Supreme Court has held that the members of committees of the legislature cannot hold or exercise any judicial or administrative offices or functions. Greenfield v. Russell, 292 Ill. 392; Saxby v. Sonnemann, 318 Ill. 600.

This constitutional provision as to division of powers has also been held to apply to municipal governments as well as to the state government.

In an opinion rendered by this department under date of November 10, 1915, in discussing the status of the law department, we said:

"And the rule that the powers of the government of the state are divided by the Constitution into three distinct departments, the legislative, executive and judicial, therefore applies to municipalities, which are state agents, as well as to their principal, the state. People v. Olson, 245 Ill. 288.

"The law department is clearly an executive or administrative branch of the government, and as such is distinct from the City Council, which is the legislative branch, and neither has any authority or control over the other, unless such authority or control is expressly granted by legislative act, and in this connection it must be borne in mind that, inasmuch as the City Council is a creature of the legislature, it is possessed of such powers, and only such powers, as the legislature has seen fit to confer upon it."

What was there said about the law department applies with equal force to the Board of Local Improvements or any other executive branch of the city government.

Subsequent to the rendition of our opinion above mentioned, our Supreme Court again announced the same principle in the case of *City of Chicago v. Matthies*, 320 Ill. 352.

While therefore it is the proper function of the City Council to pass the local laws of the municipality and it also is the proper function of its committees to gather such information and render such other assistance as may be necessary for the proper discharge of such legislative functions, yet the executive or administrative duties of carrying out such laws must be confided to administrative officers.

In regard to local improvements, section 5 of the Local Improvement act provides:

"No ordinance for any local improvement to be paid wholly or in part by special assessment or special taxation shall be considered or passed by the City Council or Board of Trustees of any such city, village or town unless the same shall first be recommended by the Board of Local Improvements provided for in this act."

And section 7 of the same act provides:

"All ordinances for local improvement to be paid for wholly or in part by special assessment or special taxation shall originate with the Board of Local Improvements."

In view of this statute, it is clear that any ordinance for the building of a subway wholly or in part by special assessment must necessarily be originated by the Board of Local Improvements, for according to the language of the statutes, an ordinance not so originated cannot even be considered by the City Council.

Since, therefore, not even the City Council has any authority to originate any ordinance for a local improvement, a mere committee of the City Council can have no greater authority in that regard.

In preparing such ordinance for a subway, however, the Board of Local Improvements undoubtedly has the right to avail itself of any useful suggestions or plans which may be called to their attention. If the City Council or any committee thereof has any suggestions to make, it would, of course, be perfectly proper for the Board of Local Improvements to give due consideration to such suggestions and if such suggestions should even amount to a complete plan for the building of a subway, yet if the Board of Local Improvements should adopt the same and make it its own and embody the same in a proposed ordinance, such ordinance could, in our opinion, with perfect propriety be said to have been originated and recommended by the Board of Local Improvements. On the other hand, of course, the Board of Local Improvements is not under any obligation to adopt the plans or suggestions offered to it by any other persons or public bodies for the statute places upon the Board of Local Improvements the duty and responsibility of originating all plans and ordinances for the making of

local improvements which are to be paid wholly or in part by special assessment. * * *

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ORIGIN AND PLANNING OF LOCAL IMPROVEMENT

(No. 6758—*City Comptroller—C. J. A. and S. L. G.—August 19, 1930*
—25 pp.)

All ordinances and plans for local improvements to be paid wholly or in part by special assessment must by statute originate with the Board of Local Improvements, and by implication these powers cannot be exercised by any other body.

Public money cannot be spent to establish an Advisory Subway Engineering Commission to perform the duties of planning a subway which is to be paid partially or wholly by special assessments, unless that commission acts merely in an advisory capacity to the Board of Local Improvements.

The expenditures of the Advisory Subway Engineering Commission should be approved by both the Council Committee on Local Transportation and the Board of Local Improvements until the Supreme Court decides the question of whether a subway may be built by special assessments.

Citations:

Constitution: Illinois, art. III.

Statute: SH '29, 24: 569c (Local Improvement act, secs. 5, 7).

Cases: Fergus v. Russel, 270 Ill. 304 (1915).

Barsaloux v. Chicago, 245 Ill. 598 (1910).

People v. Village of Oak Park, 268 Ill. 256 (1915).

Chicago v. Ross, 257 Ill. 76 (1912-13).

People v. Clark, 300 Ill. 583 (1922).

Forest Preserve District v. Tirsia, 336 Ill. 624 (1930).

Washburn v. Forest Preserve District, 327 Ill. 479 (1928).

City of East St. Louis v. Thomas, 11 Ill. App. 283 (1882-83).

Saxby v. Sonneman, 318 Ill. 600 (1925).

Foss v. Chicago, 56 Ill. 354 (1869-70).

Other references: 12 CJ 835.

1 McQuillin, Mun. Corp. (2nd ed.), sec. 394, p. 986.

Opinion No. 6719 (this volume, p. 857).

PROCEDURE IN LOCAL IMPROVEMENT ENACTMENT— SUBWAY CONSTRUCTION

(No. 6628—*President, Board of Local Improvements—J. J. S.—March 27, 1930—2½ pp.*)

The city has power to build a subway and to determine the method of payment.

If the City Council by a short ordinance shall determine that the subway is to be paid for in whole or in part by special assessment, the ordinance providing for the construction of the subway must originate with the Board of Local Improvements in the following manner:

- (1) The passage of a first resolution initiating and describing in detail the proposed improvement, and setting a day for a public hearing on it;
- (2) The preparation of an engineer's estimate, giving the cost of the component elements of the proposed improvement;
- (3) The holding of the public hearing and the passage at that hearing of a second resolution adhering to or altering the scheme of the proposed improvement; and
- (4) The preparation and adoption of an ordinance describing the proposed improvement and the recommendation of this ordinance to the City Council for passage.

Citations:

Statutes: Ill. Laws (1929), p. 266 (Act authorizing cities to construct subways).

Local Improvement act, secs. 5, 7.

ATTACHING PLANS TO SPECIAL ASSESSMENT ORDINANCE

(No. 8099—*Chief Engineer of Streets, Board of Local Improvements—V. A. K.—June 23, 1933—2 pp.*)

Mere reference in a special assessment ordinance or resolution to drawings, maps or plans on file with the Board of Local Improvements is not sufficient. The drawings, maps, or plans must be attached to the ordinance or resolution and made a part of it by reference to them.

Citations:

Statute: Cities and Villages act, art. IX, sec. 19.

Cases: City of Alton v. Middleton's Heirs, 158 Ill. 448 (1895).

City of Hillsboro v. Grassel, 249 Ill. 192 (1911).

Local Improvement Ordinance: To be the basis of a valid special assessment under the Local Improvement act, the ordinance must describe

the improvement so definitely that the property owner may know from its terms what will be the completed improvement for which his property is being assessed, and a failure to so specify invalidates the ordinance.—*Chicago v. Russo*, 339 Ill. 349 (1930).

USE OF SPECIAL FUND FOR IMPROVEMENT—LAYING STREET

(No. 7399—*City Comptroller—L. H.*—December 26, 1931—8 pp.)

Whenever the original paving of a street is a local improvement, the city must follow the provisions for the payment of the improvement prescribed in the Local Improvement act. That act does not allow the use of the vehicle tax fund, even though a part of the cost may be assessed against the city for public benefits.

Citations:

Statutes: Motor Vehicle act, sec. 26.

Cah. '31, 24: 235(1).

Cases: *Chicago v. Brede*, 218 Ill. 528 (1905).

Chicago v. Thomason, 259 Ill. 322 (1913).

City of Ottawa v. Hulee, 332 Ill. 286 (1929).

Smith v. Logan County, 284 Ill. 163 (1918).

Chicago v. Collins, 174 Ill. 445 (1898).

Harder's Storage Co. v. Chicago, 235 Ill. 58 (1908).

INITIATING LOCAL IMPROVEMENT AUTHORIZED BY REFERENDUM

(No. 6802—*President of Board of Local Improvements—E. C. H., J. G. D., and C. J. A.*—November 18, 1930—7 pp.)

Where improvements and a bond issue for them are approved by popular referendum, the City Council must comply with the popular mandate and take action, even though the bond ordinance prohibits expenditures until the City Council has made specific appropriations therefrom, and in the event of delay by the council, the Board of Local Improvements may proceed with the work and make all necessary contracts.

Citations:

Constitution: Illinois, art. IX, sec. 12.

Statutes: Cah. '29, 24: 65, 1013, 1014.

Cities and Villages act, art. VII.

Id., art. VIII, sec. 1.

Case: *Tribune Co. v. Thompson*, 342 Ill. 439 (1930).

Other reference: Webster's New International Dictionary, p. 771 "expenditure."

Local Improvement Fees: The determination by the City Council of fees to be paid real estate experts for a local improvement is a legislative matter and such discretion is not subject to judicial inquiry.—*Tribune Company v. Thompson*, 342 Ill. 503 (1930).

FINANCIAL POWERS OF BOARD OF LOCAL IMPROVEMENTS

(No. 8356—*City Comptroller—L. H.—April 4, 1934—5½ pp.*)

The City Council may designate any officer or board to administer appropriations.

When the City Council does not specify what officer should make payment of condemnation awards or act to acquire property, the Board of Local Improvements may take the necessary steps to secure the property.

The Board of Local Improvements initiates public benefit vouchers and the officer to whom the appropriation is allotted should make the payment.

The power of the Board of Local Improvements with respect to financial matters is not terminated until the last installment is collected and the last rebate has been paid.

The Comptroller "closes out" special assessment warrants as a matter of accounting.

Citations:

Statutes: SH '33, 24: 730, 745, 800, 802.

SIGNING PAY ROLL OF BOARD OF LOCAL IMPROVEMENTS

(No. 6878—*Secretary, Board of Local Improvements—L. H.—April 28, 1931—2 pp.*)

The vice-president and the secretary of the Board of Local Improvements have the power, in the absence or inability of the president, to sign and pass the pay rolls of the board.

Citation:

Statute: Local Improvement act, sec. 6.

APPROVAL OF CONTRACTS OF BOARD OF LOCAL IMPROVEMENTS

(No. 8560—*City Comptroller—A. A. S.—November 15, 1934—2 pp.*)

A contract executed by the Board of Local Improvements, pursuant to an ordinance authorizing the board to execute the same, does not require the Mayor's approval or the Comptroller's signature.

A contract entered into by the Department of Public Works must be approved by the Mayor and countersigned by the Comptroller.

Citations:

Ordinances: Code '31: 222-225.
Coun. J. (1934-35), pp. 2074, 2535.

APPROVAL OF CONTRACTS UNDER CONTROL OF BOARD OF LOCAL IMPROVEMENTS

(No. 7743—*City Comptroller—J. J. S.—September 9, 1932—2½ pp.*)

As the city ordinance establishing the Bureau of Central Purchasing excepts from its provisions all contracts under the control of the Board of Local Improvements, the Commissioner of Public Works is not a party to, and provision for his signature is not necessary in, a contract for bridge and construction work under the control of the Board of Local Improvements.

Citations:

Ordinances: Coun. J. (1932-33), p. 2411, as amended, p. 2702.
Id. (1930-31), p. 3934.

NOTICE TO ADJOINING PROPERTY OWNERS WHEN EXCAVATING

(No. 7753 — *Commissioner of Public Works — L. H.— September 22, 1932—3 pp.*)

Where the city undertakes to excavate for the substructures of a bridge, notice should be given to the owners of the adjoining properties, even though it is reasonable to suppose that no actual damage will result to the adjoining properties.

Citations:

Case: *Block v. Haseltine*, 48 American Decisions 937.
Other reference: *Cooley, Torts* (2nd ed.), pp. 705, 707.

B. SPECIAL ASSESSMENTS

(1) *Levyng and Handling Assessments**

SPECIAL ASSESSMENTS, ASSESSMENT BONDS AND VOUCHERS AS CITY DEBT

(No. 6686—*City Comptroller—L. H. May 29, 1930—3½ pp.*)

A confirmed special assessment against the city, being a debt which the city is bound to pay, is a debt within the constitutional provision limiting indebtedness to five per cent of the total assessed valuation of the taxable property within the city.

Bonds and vouchers issued by the city on local improvements which are payable solely out of assessments against property owners are not

*See Opinion No. 6563, p. 705, on the keeping of assessment rolls.

included within the constitutional debt limitation as the city is not the debtor.

Citations:

Statute: Local Improvement act, sec. 42a.

Case: Wade v. East Side Levee District, 320 Ill. 396 (1926).

SPECIAL ASSESSMENTS AS CITY OBLIGATIONS—PRIORITY OF STATE TAXES

(No. 6791—*City Attorney, Portland, Oregon—L. H.—October 18, 1930*
—5½ pp.)

Local assessments levied against the city are general obligations of the city, but in the case of local assessments assessed against property owners, the city's only duty is to exercise due diligence in collecting those assessments for the contractor.

General state taxes are paramount to local assessments only to the extent that they become delinquent and are subject to sale ahead of delinquent special assessments.

To protect its local assessments, the city may, in default of other bidders, purchase property sold for general taxes, and need bid only the amount of the special assessments and costs.

Citation:

Case: Village of Downer's Grove v. Glos, 307 Ill. 293 (1923).

Assessment Expenses: Expenses of assessing and levying special assessments under the Local Improvement act are part of the costs of the proceeding, to be assessed against the lots and parcels of land which will benefit by the improvement.—Mann v. Downers Grove Sanitary District, 281 Ill. App. 412 (1935).

PARKING STATIONS UNDER STREETS AS LOCAL IMPROVEMENTS

(No. 7129—*Commissioner of Public Works—C. J. A.—September 16, 1931—3½ pp.*)

The providing of parking space including parking devices under the surface of a street or alley, in order to relieve the congestion of traffic on the surface of the same, is a legitimate street improvement, and could therefore be lawfully made by special assessment proceedings and the issuance of bonds in the same manner as other local improvements.

Citations:

Cases: Burton Co. v. Chicago, 236 Ill. 383 (1908).

Sears v. Chicago, 247 Ill. 204, 216 (1910-11).

Tacoma Safety Deposit Co. v. Chicago, 247 Ill. 192 (1910-11).

Williams v. Chicago, 247 Ill. 240 (1910-11).

Ryerson v. Chicago, 247 Ill. 185 (1910-11).

Farwell v. Chicago, 247 Ill. 235 (1910-11).

Illinois Trust and Savings Bank v. Chicago, 247 Ill. 264 (1910-11).

SPECIAL ASSESSMENT FOR SNOW AND ICE REMOVAL

(No. 6630—*Chairman, Committee on Judiciary and Special Assessments*—W. T. C.—March 31, 1930—3½ pp.)

A special assessment for the removal of snow and ice from the sidewalks would not be valid, as a special assessment may be levied only for an improvement which is of such a permanent character as, at least presumptively, will enhance the market value of the property assessed.

Citations:

Ordinance: Coun. J. (1916-17), vol. 2, p. 3477 (Ordinance requiring abutting property owners to remove snow).

Cases: Gridley v. City of Bloomington, 88 Ill. App. 554 (1900).
Chicago v. O'Brien, 111 Ill. 532 (1884-85).
Illinois Central R. R. v. City of Decatur, 154 Ill. 173 (1894-95).
Chicago v. Blair, 149 Ill. 310 (1893-94).
People v. Cook County Board of Commissioners, 221 Ill. 493 (1906).

Reference: Opinion of the Corporation Counsel, Coun. J. (1914-15), p. 2752.

CERTIFICATION AND DUE DATE OF SPECIAL ASSESSMENT

(No. 7393—*City Collector*—A. A. S.—December 19, 1931—2½ pp.)

The date when a special assessment roll is certified to the City Collector does not affect the due date of installments.

Citation:

Statute: Local Improvement act, sec. 42.

EXEMPTION OF RAILROADS FROM SPECIAL ASSESSMENTS

(No. 6490—*Chairman of Committee on Railway*—E. C. H.—August 12, 1929—13 pp.)

The city has not the power, by way of commutation, to relieve railroad companies and their properties from the payment, by special assessment or tax, of their proportionate share of the expense in the construction and future maintenance of viaducts and other properties because the legislature has not delegated this power to the city.

Citations:

Statute: Cities and Villages act, art. V, sec. 1; art. IX, sec. 1.

Cases: Hunsaker v. Wright, 30 Ill. 146 (1861-63).
Illinois Central R. R. v. County of McLean, 72 Ill. 29 (1874).
Newstadt v. Illinois Central R. R., 31 Ill. 484 (1863).
State Bank v. The People, 4 Ill. 303 (1841-42).
City of Lincoln v. Chicago and Alton R. R. Co., 250 Ill. 273 (1911).
City of Decatur v. Pryor, 267 Ill. 221 (1915).
Chicago v. Sheldon, 76 U. S. 50 (1869).
West Chicago Street R. R. v. Chicago, 178 Ill. 339 (1899).

(The original opinion of the foregoing synopsis is reproduced on the following pages.)

OPINION OF FOREGOING SYNOPSIS

You have requested a legal opinion from the Corporation Counsel as to whether certain amendments to the pending "Illinois Central—Lake Front Ordinance" proposed by the Illinois Central and Michigan Central Railroads would exempt the property owned by the Illinois Central and Michigan Central Railroads east of Michigan avenue and Beaubien court and north of Randolph street from payment of special assessments and, if so, to what extent.

An examination of the proposed amendments shows the following provisions relating to the subject matter under consideration.

First: On page 72½A of the amendments it is provided: "The city hereby assumes to itself and agrees to pay and assume and indemnify and save harmless said railroad companies, and each of them, from and against all taxes, assessments, special or otherwise, or other charges which may or might be levied or charged against said railroad companies, or either of them, or their respective properties or interests therein for or on account of the construction, reconstruction, change of grade, opening or extension of any viaducts, elevated streets, walks, roadways or driveways provided for in this ordinance, or the construction, reconstruction, repair, renewal or replacement of any of the viaducts, elevated streets, walks, roadways or driveways provided for in this ordinance, and with the further exception that this paragraph does not apply to the Central company in connection with the construction of the Beaubien court viaduct provided for in section 2A of this ordinance."

In case the foregoing provisions are valid and incorporated in the contract ordinance, it is quite manifest that under the terms thereof the railroad companies and their said properties would be exempt and relieved from the payment of any tax or special assessment for the work and improvements specified in the above provisions of the proposed amendment.

The real question for consideration, therefore, is as to whether it lies within the power of the City Council to exempt and relieve the railroad companies, and their properties, from the payment, by special assessment or tax, of their proportionate share of the expense in the construction and future maintenance of the viaducts, elevated streets, walks, roadways or driveways in question.

Under the decisions of our Supreme Court there is no question but that the legislature possesses the power, on the principle of commutation, to exempt or relieve a property owner from the payment of special assessments or taxes for the construction, improvement and maintenance of a public street or highway in consideration of the donation by the property owner of the land or right of way to be used as such public street or highway, and such exemption by way of commutation is held not to be in violation of any provision of the constitution of the state relating to the equality and uniformity of taxation. See *Hunsaker et al. v. Wright et al.*, 30 Ill. 146; *Illinois Central Railroad v. County of McLean*, 72 Ill. 291; *Newstadt v. Illinois Central Railroad*, 31 Ill. 484; *State Bank v. People*, 4 Scam. 303; *Chicago v. Sheldon*, 76 U. S. (9 Wall.) 50.

The legislature of the state, thus possessing this power of exemption, may delegate the power to a municipality, and as to whether the city, through the City Council, possesses the power, by way of commutation, to relieve the adjoining railroad properties from the payment of special assessments and taxes as provided in the proposed amendment turns on the question as to whether the legislature has in fact delegated such power to the city.

There are a number of cases to be found in the books in which our Supreme Court has sustained the validity of analogous provisions in a contract ordinance, but an examination of these cases will show that such decisions were based upon a recognized delegation of authority by the legis-

lature to the city of the power to make such a contract. These are cases in which the city, by virtue of the authority vested in it by the legislature, has made provision in the terms of a franchise ordinance for the paving, repair and maintenance of streets by a street railway company operating under the franchise ordinance, and where the court has held that such a provision in the contract ordinance was binding between the city and the street railway company and relieved the railway company from the obligation of making any further payment by way of special assessment or otherwise for the repavement or improvement of the street. Upon the principle of commutation our Supreme Court has held that such contracts are binding. Such is the case of *West Chicago Street R. R. Co. v. Chicago*, 178 Ill. 339.

* * * * *

* * * In the course of its opinion our Supreme Court, in the above case, referred to the case of the *City of Chicago v. Sheldon*, 9 Wall. (76 U. S.) 50, in which the Supreme Court of the United States held that a similar provision in the contract ordinance between the City of Chicago and the North Chicago City Railway Company exempted the street railway company from special assessments for the repaving of a street, and that such commutation by the city was not in violation of the State Constitution providing for the equality and uniformity of taxes in respect to persons and property. * * *

* * * * *

In *City of Lincoln v. C. & A. R. R. Co.*, 262 Ill. 11, the same question as to the city's power of commutation under delegated authority from the legislature was presented and such power was sustained * * *.

It will be observed that the foregoing cases upholding the power of the city to exempt property from special assessments are based upon an expressed delegation of authority by the legislature to the city empowering the city to grant a license to a street railway upon terms and conditions, and these cases, therefore, cannot be considered as authority in this case.

However, in *City of Decatur v. Pryor*, 267 Ill. 221, our Supreme Court has applied the principle of the foregoing cases to a situation that may form a basis in support of the view that the provisions of the proposed amendment in question may be within the power of the city to incorporate in the contract ordinance, and that under the same the railroad companies would be exempt and relieved from the payment of the special assessments and taxes specified in the proposed amendment. In the above case the City of Decatur in the exercise of its police power required the Wabash Railroad Company and the Cincinnati, Hamilton & Dayton Railway Company to elevate its tracks over a public street previously crossed by the railroad tracks at grade. In the ordinance requiring the track elevation it was provided "that said bridge or viaduct and said subway * * * should be constructed and maintained by and at the sole expense of the railway companies under whose tracks or property the same was to be situated" and also required "the said railway companies to pave with brick the roadway in said subway," and specifies particularly the character of the pavement to be made by said companies in said subway.

Section 6-A of the ordinance also provided as follows: "It shall be the duty of the City of Decatur, at its own expense, to build, construct and maintain the approaches to said subway in accordance with the plans and specifications therefor referred to in paragraph 3 of section 3 of this ordinance."

The court, in holding that the above section 6-A relieved and exempted the railroad companies from the payment of any special assessment for the construction of the approaches to the subway said: "Appellants contend that ordinance No. 158 having been accepted by the said railway companies, constituted a valid contract with the city, and that under section 6-A the city contracted with appellant that it would 'build, construct and maintain the approaches to said subway' and that thereby the appellant companies

should be relieved from any special assessment, a substantial portion of which was to be expended in paving the approach to said subway. The parties agree that ordinance No. 158 constitutes a valid and binding contract between the City of Decatur and appellant. The only controversy relates to the construction to be given to section 6-A of said ordinance."

The court after reviewing the various clauses of the contract for the purpose of arriving at the proper interpretation of section 6-A of the ordinance continued: "If it had been the intention of the city to reserve the right to pave the approaches to the subway and charge the proportionate part of the cost to the railway companies, such intention could have been made clear and unequivocal by adding a proviso such as is found in connection with the provision in regard to additional sewers in said approaches. The presence of such proviso in regard to the sewer and its absence in connection with the construction, building and maintenance of the roadway lends force to the conclusion that the city intended to relieve the railway companies from any portion of the burden of paving the said approaches. * * * The city had the power to enter into this contract with the railway companies, and the same is a binding obligation upon each. (McChesney v. City of Chicago, 213 Ill. 592; City of Lincoln v. Harts, 250 Id. 273) * * *. Our conclusion is that the court erred in overruling the objections of the appellants and in holding that the railroad properties were liable for any portion of the cost of paving the approaches to the subway."

It may be stated that the two cases above cited by the court are street railway cases in which the railway companies were operating under franchise ordinances. It is evident that in the City of Decatur case the court must have upheld the validity of the clause in the ordinance exempting the railroad companies from special assessments for the paving of the approaches to the subway on the theory that there had been a delegation of police power by the legislature to the city under which the city passed the ordinance requiring the elevation of the railroad tracks and providing for the construction of the subway, and that in the attainment of the ultimate purpose or object of providing for the safety of the public there were implied such incidental powers as were necessary in the construction of the work to safely carry such ultimate purpose or object into effect.

If this is the proper interpretation of the decision of the Supreme Court in this City of Decatur case, I can understand how the legal reasoning underlying it may with much plausibility, not to say force, be applied to the situation presented in this case. Under the Cities and Villages act, article V, section 1, among the enumerated powers of the City Council are: Seventh. "To lay out, to establish, open, alter, widen, extend, grade, save or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same, and for such purposes or uses to take real property or portions thereof belonging to said city or village and already devoted to a public use when such taking will not materially impair or interfere with the use of already existing streets and is not detrimental to the public."

Twenty-eighth. "To construct and keep in repair bridges, viaducts and tunnels, and to regulate the use thereof."

Article IX, section 1: "That the corporate authorities of cities, villages and incorporated towns are hereby vested with the power to make such local improvements as are authorized by law by special assessment, or by special taxation, of contiguous property, or by general taxation, or otherwise, as they shall by ordinance prescribe."

It is thus seen that there is an express delegation of power from the legislature to the city to make the local improvement contemplated by this lake front ordinance and to construct the elevated streets, viaducts and driveways specified in the proposed amendment, and to provide for the payment of the same by special assessment or by special taxation of contiguous property, as the City Council shall by ordinance prescribe.

It may be argued that the city, being vested with these broad powers in the extension and construction of public streets and ways, is possessed of the incidental power of acquiring the right of way necessary to accomplish the ultimate purpose or object by way of commutation, and to grant an exemption from special assessment or tax as an equivalent for the right of way thus secured. However, in the absence of an express decision of our Supreme Court upon the precise question, I am of the opinion that this contention is a doubtful one, and while recognizing the force of argument that may be advanced in support of this claim, I do not feel justified, in the absence of any definite decision upon the question, to advise your committee that the City Council has the power to commute as provided by this proposed amendment the special assessments that may become necessary in the future improvement and maintenance of these elevated streets, viaducts and driveways contemplated by the proposed ordinance * * *.

I am of the opinion that the City Council does not possess authority to exempt the property of the railroads from taxation under this provision of the proposed amendment, and that such provision is void.

DISMISSAL OF LOCAL ASSESSMENT CASES BY CITY

(No. 8810—*Chairman, Committee on Local Transportation—J. J. S. and A. A. S.—July 10, 1935—7 pp.*)

The city may dismiss the subway assessment case at any time before the contract is let, and will not be answerable in damages for the abandonment of the case.

The city may dismiss the North State street widening case at any time before final judgment is entered, and no recovery can be had by the owners of the property on that street, especially since there was no wrongful delay in the case.

The Local Improvement act is a complete code, and there is nothing in it which provides for assessing damages when a local assessment case is dismissed.

Citations:

Constitution: Illinois, art. II, sec. 13.

Statutes: SH '33, 24: 731, 758.

Cases: Sanitary District of Chicago v. Chapin, 226 Ill. 499 (1907).
Winkelman v. Chicago, 213 Ill. 360 (1904-05).
City of Evanston v. Knox, 241 Ill. 460, 468 (1909).
Ricker v. City of Danville, 204 Ill. 194 (1903).
Chicago v. Sullivan Machinery Co., 269 Ill. 58 (1915).

HANDLING OF SPECIAL ASSESSMENT FUNDS

(No. 8098—*City Comptroller—L. H.—June 23, 1933—5 pp.*)

The city merely acts as trustee in holding funds collected by special assessment and cannot use those funds in any way other than that authorized by statute.

Funds from an assessment may be shifted from one installment to

another of that assessment, but funds may not be shifted from one assessment to another assessment.

Citation:

Statute: Cities and Villages act, art. VII, sec. 12.

DISBURSING INTEREST ON SPECIAL ASSESSMENT DEPOSITS

(No. 7183—City Comptroller—L. H.—October 10, 1931—6½ pp.)

No particular method of procedure is required for disbursing monies from interest on deposits of special assessment funds, the only requirement being that there must be an ordinance which must specify what use is to be made of the money and how much is to be used.

While it is proper to appropriate from the interest on special assessment deposits for the payment of public benefits and condemnation, it is doubtful that large sums can be appropriated for that purpose.

Citations:

Statute: SH '29, 24: 667, 814-819.

CREDIT OF WARRANTS TO THE SPECIAL ASSESSMENT REIMBURSEMENT FUND

(No. 6738—President, Board of Local Improvements—C. J. A.—July 30, 1930—3 pp.)

Warrants on which all obligations have not been paid cannot be credited to the five per cent special assessment reimbursement trust fund, as the City Council's intent was to create a fund against which there were no outstanding liens or obligations.

Citation:

Ordinance: Coun. J. (1930-31), p. 2860 (Five per cent special assessment reimbursement trust fund ord.).

INVESTMENT OF SPECIAL ASSESSMENT FUNDS IN TAX ANTICIPATION WARRANTS

(No. 7259—City Comptroller—L. H.—November 5, 1931—3½ pp.)

The city may continue to make purchases of tax anticipation warrants from the aggregate of funds in the city treasury, which will include the special assessment fund, but will not specifically draw on it.

Citations:

Cases: People v. Hummel, 215 Ill. 71 (1905).

Muskegon Traction and Lighting co. v. City of Muskegon, 167 Mich. 331 (1911).

Sinking Fund Cases, 99 U. S. 700 (1878).

Other references: Op. Corp. Counsel (1913-14), p. 270.

Id. (1914-15), p. 26.

Id. (1916-19), p. 667.

(2) *Payment and Delinquency of Assessments*

Paying Assessments, Time Extension: The court having jurisdiction of the original assessment proceeding is authorized at any time after the assessment has been confirmed, to extend the time for payment of assessments.—Ill. Laws (1935), p. 422.

Tax Objections: The act which requires a person objecting to the taxes on his land to pay seventy-five per cent thereof under protest is not applicable to objections to special assessments since "special assessments" are not taxes.—*People v. Brewer's Estate*, 362 Ill. 88 (1935).

PAYMENT OF SPECIAL ASSESSMENTS WITH SCHOOL WARRANTS

(No. 7727—*L. H. August 22, 1932—3 pp.*)

The city has no power to accept tax anticipation warrants issued against Board of Education taxes in payment of special assessments as the Board of Education is a municipal corporation distinct and separate from the city.

PAYMENT OF SPECIAL ASSESSMENTS BY SCHOOL "CERTIFICATE OF INDEBTEDNESS"

(No. 6458—*City Comptroller—J. W. B.—June 22, 1929—2 pp.*)

The City Comptroller or City Collector cannot accept "certificates of indebtedness" from the Board of Education in payment of special assessments due from the Board without express authority from the City Council.

Citations:

Cases: *Padfield v. Greene*, 185 Ill. 530 (1900).

Scott v. Gilkey, 49 Ill. App. 122 (1893).

Other reference: *Storey, Agencies*, secs. 98, 99.

REBATE OF UNCLAIMED MONIES FROM SPECIAL ASSESSMENTS*

(No. 6468—*Deputy Comptroller—R. N. L.—July 12, 1929—2½ pp.*)

Where a person makes a demand for the payment due him of unclaimed money received from the making of local improvements by special assessments or special taxation within the period of advertising and prior to the passage of the ordinance placing such money in the unclaimed rebate fund, he is entitled to the rebate.

Citations:

Ordinance: Coun. J. (1924-25), pp. 3890-3912.

Id. (1928-29), p. 2759.

Statute: Cah. '27, 24: 1006.

*See Opinion No. 8817, p. 652, on the rebate of a special assessment for an uncompleted improvement.

RECOVERY OF SPECIAL ASSESSMENT REBATE PAID TWICE

(No. 6660—City Comptroller—L. H.—May 2, 1930—2½ pp.)

The city has a claim against a property owner to whom it has paid a special assessment rebate twice by mistake. The marking of the records so as to indicate that the assessment has not been paid, and the return of the assessment as delinquent to the County Collector would not be fair to the property owner, and would be so irregular that it would create complications out of all proportion to the advantage to be gained.

The city should seek to recover the erroneously paid money by the ordinary method of obtaining a judgment for the amount and taking execution on it.

INTEREST ON UNPAID INSTALLMENTS OF A SPECIAL ASSESSMENT

(No. 8681—A. A. S.—February 25, 1935—1 p.)

Interest on the unpaid installments of special assessments begins to run immediately after the issuance of the first voucher to the contractor. The Mayor is without power to prevent this.

PENALTIES FOR DELINQUENT SPECIAL ASSESSMENTS

(No. 8149—City Comptroller—A. A. S.—August 21, 1933—2 pp.)

The city is entitled to the penalty of twelve per cent for the first year and six per cent each year thereafter on all properties forfeited for failure to pay installment of special assessments because penalties for delinquent taxes generally follow the tax and go to the district entitled to the tax unless otherwise provided by statute.

Citations:

Statute: SH '33, 120: 165, 166, 212.

Other reference: 4 Cooley, Taxation (4th ed.), sec. 1821.

Delinquent Assessments, Penalties: The City Council in counties having a population of 500,000 inhabitants or more may authorize the waving of penalties for the first year in excess of seven per cent when delinquent property is redeemed.—Ill. Laws (1935), pp. 1176, 1177.

SETTLEMENT OF PENALTIES ON DELINQUENT SPECIAL ASSESSMENTS—PAYMENT OF SPECIAL ASSESSMENTS

(No. 8835—City Comptroller—J. J. S.—August 7, 1935—4 pp.)

The city has the right to accept settlements on past forfeitures and withdrawals on special assessment delinquencies, but this authority

to collect under the provisions of Senate bills 469 and 470 only permits a waiver of the penalty in excess of seven per cent, and gives no authority to reduce the principal payment or the unpaid interest.

The penalties provided for in Senate bills 469 and 470 do not apply to past withdrawals.

The penalty rate on past forfeitures and withdrawals should be charged on the full amount due; that is, the unpaid installment plus the interest.

The city is obliged to accept special assessment bonds in payment of installments to which they relate, whether delinquent or otherwise.

Citations:

Statutes: SH '33, 120: 212.

Id., 24: 795.

Case: Mather v. Parkhurst, 302 Ill. 236 (1922).

RETURNS OF DELINQUENT SPECIAL ASSESSMENTS TO COUNTY COLLECTOR

(No. 6536—City Collector—L. H.—November 6, 1929—4 pp.)

The date set by statute for making the return to the County Collector of delinquent special assessments is merely directory and not mandatory.

A report on old delinquent special assessment installments can be delayed and included in the next regular return to the County Collector.

Citations:

Statute: SH '27, 24: 766, 769 (Local Improvement act, secs. 63, 65).

Case: People v. Freeman, 301 Ill. 562, 566 (1922).

REASSESSMENT OF DELINQUENT SPECIAL ASSESSMENTS

(No. 8464—Board of Local Improvements—A. A. S.—July 11, 1934—2 pp.)

Where the city fails to collect the whole or any portion of a special assessment which has not been cancelled or set aside by a court order, the City Council may within five years direct a new assessment to be made upon the delinquent property for the amount of such deficiency plus interest from the date of the original assessment.

Citation:

Statute: Local Improvement act, sec. 60.

SUSPENSION OF PROPERTY SALES FOR DELINQUENT SPECIAL ASSESSMENTS

(No. 7080—*Chairman, Committee on Finance—L. H.—August 20, 1931—2½ pp.*)

Suspending a sale of property for a delinquent special assessment merely defers such tax sale but interest continues to run on the assessment. The absence of such revenues may cost the city interest expenses when it cannot pay for condemned property on the due date; the only benefit to the parties assessed of such suspension is in extension of time within which the assessment can be paid.

SETTLEMENT OF DELINQUENT SPECIAL ASSESSMENTS

(No. 7950—*City Comptroller—L. H.—February 17, 1933—5 pp.*)

The Mayor and City Clerk may execute quitclaim deeds where the city acquired a tax deed and the property can no longer be redeemed by the owner if the city receives the amount paid by it together with the expense of obtaining the deed or certificate and not less than six per cent interest from the date of the sale, but no settlement for delinquent special assessments can be made where such redemption period has not expired unless authorized by special ordinance.

The city is entitled to demand the full penalty prescribed by statute for the redemption period plus five per cent interest for the time after the expiration of the redemption period.

Citations:

Statute: SH '31, 74: 2.

Ordinance: Code '31: 76.

PURCHASE BY CITY AT DELINQUENT ASSESSMENT SALE—CITY'S RIGHTS IN PROPERTY FORFEITED TO STATE

(No. 7914—*City Comptroller—L. H.—January 25, 1933—4½ pp.*)

Where the city bids in at a tax sale for delinquent special assessments, it is not obligated to pay cash into the special assessment fund of the amount of the bid but may transfer a credit for the payment. In so bidding, the city does not transfer the obligation to pay special assessment warrants to itself but merely changes the form of the lien without changing the legal effect of the lien; hence the city is not liable for the amount bid to the holders of claims against the special assessments.

When property is forfeited to the State for tax delinquency, the only interest remaining to the city arises in case of redemption in

which case the city is entitled to be paid the taxes due it on the property.

Citations:

- Statutes: Revenue act, sec. 225.
Local Improvement act, sec. 73.
Case: Farrel v. Chicago, 198 Ill. 558 (1902).

**CITY'S RIGHTS IN PROPERTY SALE FOR DELINQUENT
SPECIAL ASSESSMENTS***

(No. 8719—*City Comptroller—J. F. G.—March 15, 1935—2½ pp.*)

In default of other bidders, the city has the right to bid in at the sale of any real estate subject to the lien on special assessments, to allow the property to become forfeited, or to withdraw the delinquent assessments from collection. If the city bids in at the sale, it is required immediately to pay the amount bid and the sale cannot be closed until that payment is made. If the city does not bid in at the sale, it may allow the property to be forfeited and upon redemption, it is entitled to the delinquent tax, interest, and penalties.

The city's interest in any real estate subject to the lien of special assessments are adequately protected by the present provisions of the Local Improvement act without further amendment.

Citations:

- Statutes: Local Improvement act, sec. 72.
Revenue act, sec. 206.

**SPECIAL ASSESSMENT LIENS UPON FORECLOSURE OF
PROPERTY†**

(No. 6785—*City Comptroller—L. H.—October 6, 1930—6½ pp.*)

The city's liens for special assessments are cancelled when the city has been summoned as a party defendant in a tax foreclosure suit, but has neither entered an appearance nor filed its claim, and the court decrees that the general tax claims of the county are superior to all others. The city may, however, exercise its right of redemption or appeal or it may file a bill for review. With respect to tax sales that took place between the time of commencement of the suit and the date of the decree, the liens of the city are wiped out to the same extent as older liens.

It is reasonable to presume that the legislature intended to have the filing of tax certificates give the city the same rights as if it had

*See also Opinion No. 6489, p. 717, on the sale of property for delinquent assessments.

†See also Opinion No. 7171, p. 717, on foreclosure for delinquent assessments.

taken out tax deeds. The city should take out tax deeds on property when an effort is being made to destroy the city's liens.

Citation:

Statute: General Revenue act, secs. 224-225.

DISPOSITION OF RECEIPTS UNDER VOID SPECIAL ASSESSMENT SALE

(No. 6524—Acting Deputy Comptroller—S. L. G.—October 11, 1929—2 pp.)

Where a special assessment sale has been declared void by a court order and the County Treasurer has made a proper demand that the monies deposited with the Deputy Comptroller as the result of the sale should be returned to him, the Deputy Comptroller must return the monies so received.

LIABILITY FOR COSTS OF COLLECTING SPECIAL ASSESSMENTS UPON PURCHASE OF PROPERTY

(No. 6734—Comptroller—C. J. A.—July 29, 1930—2 pp.)

When the city purchases property at a sale for delinquent special assessments, it must pay the commission charged by the County Collector for the collection of the special assessment just as any private purchaser. The city is subject to such charge even though no appropriation had been made therefor.

Citation:

Statute: Revenue act, sec. 178 as amended.

DEDUCTIONS OF COSTS FROM SPECIAL ASSESSMENTS COLLECTED BY COUNTY COLLECTOR

(No. 7692—City Comptroller—L. H.—August 4, 1932—4½ pp.)

When the County Collector demands payment of all charges, not only for delinquent property purchased by the city at a special assessment sale, but also for costs on those items which the city first undertook to purchase but later withdrew from the sale, before he will remit such special assessments to the city, and if the city appropriation to cover such charges is exhausted, the city may permit the County Collector to deduct and charge the entire costs against the amount due from each of the respective warrants.

To protect against any irregularity in the above transaction the Comptroller should carry the amounts deducted on his books as a loan from some other appropriation and should ask the City Council to make a transfer from some other appropriation to cover the amount deducted.

Citation:

Statute: Local Improvements act, sec. 72.

C. SPECIAL ASSESSMENT BONDS AND VOUCHERS

USE OF IMPROVEMENT BOND FUND PROCEEDS DIRECTLY FOR IMPROVEMENT

(No. 7169—Alderman, 39th Ward—L. H.—October 5, 1931—2½ pp.)

The Kimball avenue street improvement bond fund, which was authorized to be used for any purpose in connection with said improvement, may be drawn on directly to complete the improvement and it is unnecessary to transfer monies from the bond fund to the special assessment fund for this purpose and then later reimburse the bond fund from the special assessment fund.

Citation:

Ordinance: Coun. J. (1925-26), p. 2836-37.

SPECIAL ASSESSMENT AND ASSESSMENT BONDS AGAINST THE CITY

(No. 6513—City Comptroller—L. H.—September 25, 1929—4½ pp.)

An assessment for public benefit against the municipality under section 42-a, as amended, of the Local Improvement act is to be treated in the same manner as assessments against private owners.

The bonds for an assessment for public benefits as is provided for in section 42-a, as amended, are subject to the restriction that the bonds must be sold for par plus accrued interest.

The payment for each installment as it matures, and interest thereon, of bonds for an assessment for public benefit under section 42-a of the Local Improvement act must be provided for by an appropriation in the annual appropriation bill.

To the extent that bonds for an assessment for public benefit cover the assessment against the municipality, they are to be regarded as coming within the debt limitation prescribed by the Illinois Constitution.

When bonds for a public assessment against the municipality are issued, the city may issue a voucher to the property owner granted a condemnation award and subsequently convert the voucher into special assessment bonds or it may sell the bonds and pay the property owner from the proceeds of the sale.

The delivery of vouchers or bonds covering a public benefit assessment against the city for a condemnation award payment does not release the city from its obligation to pay the installments of the

assessment against the city as they become due, but no greater liability would be created thereby than if the installments were not anticipated by bonds.

Citation:

Statute: Local Improvement act, sec. 42a (as amended April 17, 1929), 86, 87.

COSTS OF TITLE SEARCH FROM PROCEEDS OF SPECIAL ASSESSMENT BONDS

(No. 8184—*Chairman, Committee on Finance—L. H.—October 5, 1933—3 pp.*)

The cost of title searches in connection with a local improvement may be paid from the proceeds of the improvement bonds where the ordinance authorizing the bond issue provides that they shall be used to acquire the real estate necessary for the improvement or some similar language.

PAYMENT OF MATURED SPECIAL ASSESSMENT BONDS

(No. 7846—*City Comptroller—L. H.—December 20, 1932—4½ pp.*)

Until directed otherwise by the court, the City Comptroller may continue his practice of paying matured special assessment bonds on the basis of "first come, first served" rather than on a pro-rata basis.

The holder of special assessment vouchers is bound to ascertain when sufficient money has been collected to pay the principal and interest on his voucher and then to demand payment; the city owes no duty to notify the holder that there is enough money to pay him.

Citations:

Statute: Local Improvement act, sec. 43.

Cases: Rothschild v. Village of Calumet Park, 262 Ill. App. 96 (1931).

Village of Wilmette v. People, 214 Ill. 107 (1905).

Other reference: Op. Corp. Counsel (1916-19), p. 783.

REDEMPTION OF SPECIAL ASSESSMENT BONDS

(No. 6866—*Acting City Comptroller—L. H.—April 14, 1931—2½ pp.*)

Whenever monies are available for the payment of bonds under section 43 of the Local Improvement act, the Comptroller must make the selection for payment by lot and notice thereof must be given to the bondholders; when this procedure is complied with, the interest on the bonds ceases to run.

Citation:

Statute: Local Improvement act, sec. 43.

PAYMENT OF SPECIAL ASSESSMENT BONDS AND INTEREST THEREON

(No. 7897—City Comptroller—L. H. and I. R.—January 13, 1933—
6½ pp.)

Nothing in the Local Improvement act provides for the partial payment from time to time as money is available of an issue of matured special assessment bonds.

When the city has given statutory notice that it is prepared to pay certain special assessment bonds on a specified day, the interest stops on the day specified; when only a part of the money for bonds has been collected and is applied in payment of the bonds, interest on such portion as is paid stops, but the portion remaining unpaid continues to draw interest until paid or the statutory notice of readiness to pay is given.

It is not necessary to prorate the payment of interest due on outstanding special assessment bonds.

Payment of bonds in amounts of \$100.00 or multiples thereof is lawful.

If one person owns all the bonds of an issue, he should be required to present them all together.

Where vouchers have not been converted into bonds, the same principle of prorating should be applied.

Unpaid bonds remaining in an installment in which there are no funds, when certain of the bonds in the same installment have already been paid on the basis of "first come, first served" should be paid in the future on the pro-rata principle.

Even where bonds and vouchers have been collected and for which checks in payment have been prepared, pro-rata distribution should be made since the checks have not in fact been paid out.

Citations:

Statute: Local Improvement act, sec. 43.

Case: Rothschild v. Village of Calumet Park, 350 Ill. 330 (1933).

PAYMENT OF SPECIAL ASSESSMENT BONDS IN FULL INSTEAD OF PRO RATA

(No. 8524—Comptroller—J. J. S.—October 16, 1934—2½ pp.)

The Comptroller may pay some special assessment bonds in full instead of prorating payments when such bonds are held by one person and he agrees to hold the city harmless for a failure to prorate

the money available whether the unpaid bonds be in the possession of the contracting party or subsequent purchasers.

Citation:

Statute: Local Improvement act, sec. 43.

Opinion No. 8137 of August 4, 1933, to the City Comptroller is in accord with the above opinion.

PAYMENT OF SPECIAL ASSESSMENT BONDS IN FULL INSTEAD OF PRO RATA

(No. 8563—Comptroller—J. J. S.—November 17, 1934—3½ pp.)

Agreements with the city whereby special assessment bondholders obtain payment in full on a part of these bonds and provide a surety to protect the city against a right of action by the owners of bonds not prorated as a consequence of this payment, may properly state, in addition, that whenever a call is issued for bond payments under the agreement, interest will stop on the day set for the payment of the bonds called.

Citations:

Statute: SH '33, 24: 745, as amended, July 6, 1933.

Other reference: Op. Corp. Counsel (1916-19), p. 782.

POSTAGE AND INSURANCE CHARGES AGAINST SPECIAL ASSESSMENT BOND PAYMENT

(No. 8936—City Comptroller—J. J. S.—November 20, 1935—1½ pp.)

The city may charge the insurance and postage for mailing, as well as the cost of registered notice and publication of notice of payment, against special assessment bonds called in for payment.

PAYMENTS OF LOST SPECIAL ASSESSMENT BONDS

(No. 6913—City Comptroller—L. H.—May 23, 1931—2 pp.)

If a claim on a lost special assessment bond is made against the city, the city should require a surety bond of at least double the amount of the lost bond before paying the claim.

Citation:

Statute: SH '31, 98: 15.

PAYMENT OF STOLEN SPECIAL ASSESSMENT BONDS

(No. 7163—City Comptroller—S. A. M.—October 2, 1931—3 pp.)

Special assessment improvement bonds are non-negotiable and neither the principal nor interest should be paid to the holder of

stolen special assessment improvement bonds as title to stolen non-negotiable instruments cannot be conveyed to an innocent purchaser and the city would be liable to the true owner.

Citations:

- Cases: Drouineau v. First National Bank, 244 Ill. App. 251 (1927).
National Bank of LaCrosse v. Petterson, 200 Ill. 215 (1902-03).
Northern Trust Co. v. Village of Wilmette, 220 Ill. 417 (1906).
Other reference: 4 American and English Encyclopedia of Law 87.

PAYMENTS OF DISPUTED CLAIMS TO SPECIAL ASSESSMENT BOND

(No. 8435—*City Comptroller*—A. A. S.—June 14, 1934—1 p.)

Special assessment bonds are not negotiable.

Where one party claims that a special assessment bond was obtained from him under false pretenses and a second party to whom the Comptroller's receipt for the bond was issued demands said bond, the bond should be delivered to the second party on production of the receipt, but the proportionate share of any fund for the payment of this bond should be retained until the dispute between the two parties is settled.

Citations:

- Cases: National Bank of LaCrosse v. Petterson, 200 Ill. 215, 219 (1902-3).
Northern Trust Co. v. Village of Wilmette, 220 Ill. 417, 426 (1906).

PAYMENT OF SPECIAL ASSESSMENT VOUCHERS

(No. 8014—*City Comptroller*—L. H.—April 12, 1933—2½ pp.)

If there is a deficiency in the general corporate fund and the Comptroller has other obligations payable from it which he considers more urgent, he may withhold payments on special assessment vouchers until such a time as he considers it safe to make those payments.

Special assessment vouchers which are to be paid from bond funds will have to be paid, if the money has been realized from the sale of the bonds.

The Comptroller can do nothing about paying special assessment vouchers for which no appropriation has been made, other than to report the vouchers to the City Council as obligations past due for which an appropriation should be made in the next budget.

D. CONDEMNATION

(1) *Powers and Duties in Condemnation*

CONDEMNATION FOR GARBAGE DUMP

(No. 7121—J. W. M.—September 12, 1931—1 p.)

The city has power to condemn private property for the purpose of establishing a dump for the disposal of garbage and ashes.

NEGOTIATIONS FOR PURCHASE OF PROPERTY FOR IMPROVEMENTS

(No. 7326—City Comptroller—L. H.—November 28, 1931—1½ pp.)

The statutes do not require notice as a basis for jurisdiction in condemnation proceedings, but do require that there be some effort to agree on a sale or on a price for the property.

The notice of an offer for the purchase of condemned property can be sent by registered mail.

The receipt of a registered letter, with proof that it contained an offer, would undoubtedly be accepted by the court as proof of the offer.

CONDEMNATION OF A PUBLIC USE FOR A PUBLIC USE— CONDEMNING RAILROAD PROPERTY

(No. 7474—Chairman, Committee on Railway Terminals—I. R. and J. J. S.—March 2, 1932—31½ pp.)

If the city, under a general delegation of power, tries to condemn property already devoted to a public use, it can do so only when the new use will co-exist with the existing use.

The city has the power to condemn easements held by certain railroad companies to the extent that is necessary for the construction of an elevated extension of Franklin and other streets. This improvement is a local one.

Abutting railroad property may be assessed for this improvement in varying degrees, depending on the use and the legal restriction on that use.

Only a nominal amount should be paid to the railroad companies for their air rights which will be taken for street purposes, as the

elevated street structure will not injure the rest of the railroad property that is devoted to railroad purposes.

Citations:

Constitution: Illinois, art. XI, sec. 14.

Statute: Cah. '31, 24: 65 (7, 89).

Cases: Chicago and Alton Railroad v. City of Pontiac, 169 Ill. 155 (1897).
Chicago and Northwestern Railway v. Chicago, 151 Ill. 348 (1894).
Illinois Central Railroad v. Chicago, 141 Ill. 586 (1892).
Chicago v. Blair, 149 Ill. 310 (1893-94).
City of Bloomington v. Chicago and Alton Railroad, 134 Ill. 451 (1890-91).
Crane v. West Chicago Park Commissioners, 153 Ill. 348 (1894).
Fisher v. Chicago, 213 Ill. 268 (1904-05).
Bush v. City of Peoria, 215 Ill. 515 (1905).
Village of Glencoe v. Hurford, 317 Ill. 203 (1925).
City of Chicago Heights v. Walls, 319 Ill. 411 (1926).
City of Waukegan v. DeWolf, 258 Ill. 374 (1913).
Chicago v. Blair, 149 Ill. 310 (1892-93).
Chicago v. Law, 144 Ill. 569 (1891-2-3).
Illinois Central Railroad v. Chicago, 141 Ill. 509 (1892).
Chicago Union Traction Co. v. Chicago, 204 Ill. 363 (1903).
Chicago v. Chicago and Northwestern Railway, 278 Ill. 86 (1917).

Other reference: 10 Ruling Case Law 169.

OPINION OF FOREGOING SYNOPSIS

In your letter you transmit a copy of a plan for the extension of Franklin street and other streets, at an elevation, over railroad terminals and desire to know whether the extension of Franklin street from Harrison street to Archer avenue, as proposed, would constitute a local improvement and to what extent railroad property in this district could be assessed for the improvement. The consulting engineer for the City Council Committee on Railway Terminals informed us that the proposed street would be over and parallel certain railroad tracks, all of which tracks would turn out from under the projected elevated street before Archer avenue was reached.

In answering your letter three questions necessarily present themselves, two of which you suggest, (1) Is the improvement as proposed a local improvement? (2) To what extent will the railroad property be subject to an assessment? and (3) (A new question which arises necessarily from the first two) Has the city power to condemn for a public use property already devoted to a public use for the purpose of constructing the upper level or viaduct street as proposed?

The first question to be determined is the power of the city to condemn for another public use property already devoted to a public use. If the city has not this power the other two questions will need no answer. Eminent domain is the right inherent in the nation or the state to take or damage private property for public use on the payment to the owner of just compensation.

Section 14, article XI, of the Constitution of 1870 (Cahill's Illinois Revised Statutes 1931) provides as follows:

"The exercise of the power, and the right of eminent domain, shall never be so construed or abridged as to prevent the taking, by the General Assembly, of the property and franchises of incorporated companies already organized, and subjecting them to the public necessity the same as of individuals. The right of trial by jury shall be held inviolate in all

trials of claims for compensation, when, in the exercise of the said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right."

Municipalities, however, have no inherent power of eminent domain. They have no powers except those expressly authorized by the legislature and those which arise by implication as necessary to carry into effect those expressly authorized. The power, however, to exercise the right of eminent domain has been delegated by the General Assembly to municipalities. By paragraph 7, section 65, article V, chapter 24, Cahill's Illinois Revised Statutes 1931 (page 337), cities and villages are given power:

"To lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same, and for such purposes or uses to take real property or portions thereof belonging to said city or village and already devoted to a public use, when such taking will not materially impair or interfere with the use already existing and is not detrimental to the public."

By paragraph 89 of the same section the following power is vested in cities (page 341):

"The City Council shall have power by condemnation or otherwise, to extend any street, alley or highway over or across, or to construct any sewer under or through, any railroad track, right-of-way or land of any railroad company (within the corporate limits); but where no compensation is made to such railroad company the city shall restore such railroad track, right-of-way or land to its former state, or in a sufficient manner not to have impaired its usefulness."

With the plenary power of eminent domain resting in the General Assembly has the General Assembly delegated by said paragraphs 7 and 89 that power to the city so as to enable it to extend Franklin street at an elevation over railroad lands as proposed in the plan? We think it has.

Where there is merely a general delegation of power to a municipality to exercise the right of eminent domain and the municipality attempts to take land already in public use, the rule as stated in Ruling Case Law volume 10, section 169, is as follows:

"While it is well settled that the legislature may constitutionally authorize the taking of property devoted to a public use for a different public use, it is equally well established that a general delegation of the power of eminent domain to a municipal or a private corporation does not authorize the taking of public property, or property already devoted to a public use, unless it can clearly be inferred from the nature of the improvements authorized or from the impracticability of constructing them without encroaching upon such property that the legislature intended to authorize such a taking, as, for instance, in the case of a statute authorizing municipal corporations to care for their internal affairs, which carries an implication that such a corporation may condemn railroad property for the purpose of extending a street across a railroad and for other municipal purposes, provided the two uses may reasonably coexist."

If the municipality, under a general delegation of power, attempts to condemn property already devoted to a public use, it can do so only when the taking will not be exclusive but the new use will coexist with the existing use. Our Supreme Court has held, however, that the powers delegated to municipalities by paragraph 89 above quoted is not a general but a special grant of the power to condemn.

The location of new streets and the extension and widening of old streets is committed by the legislature to the discretion of the municipal authorities. The question of the power of the municipality to extend its streets

over the rights of way of railroad companies has been frequently passed on by our Supreme Court.

In *C. and A. R. R. Co. v. City of Pontiac*, 169 Ill. 155, at page 162 the court declares the power of the city to condemn for a public use land already devoted to a public use, in the following language:

"Lands, once taken for a public use pursuant to law under the right of eminent domain, can be appropriated by proceedings in *in vitum* to a different public use, where there is legislative authority authorizing the same to be done. Such legislative authority exists in paragraph 89 of section 1 of article 5 of the Cities and Villages act, which provides, that 'the City Council shall have power by condemnation or otherwise, to extend any street, alley or highway over or across, or to construct any sewer under or through any railroad track, right of way, or land of any railroad company within the corporate limits.'" * * *

An objection to the power of the city to open a street across a railroad yard was also decided adversely to the railroad company in *Chicago and Northwestern Railway Co. v. City of Chicago*, 151 Ill. 348.

The meaning of the term "over or across" has been discussed at length in *I. C. R. R. Co. v. City of Chicago*, 141 Ill. 586 * * *.

The contemplated extension of Franklin street will provide for a viaduct street parallel with and over the tracks for some distance. In our opinion the word "over" applies not only to a viaduct constructed at right angles to the track but also to one constructed longitudinally with the track.

Such use of the space above the track will not impair the railroad franchise and may co-exist with the present use. It is our opinion that under the powers given to municipalities in paragraphs 7 and 89 (*supra*) the city is authorized to extend Franklin street as proposed.

Is the improvement as proposed a local improvement? We think it is.

The Supreme Court has frequently considered the question of whether an improvement is local or general and has laid down principles distinguishing a "local improvement" from a "general improvement." The power to make a local improvement by special assessment comes from the Constitution. Section 9 of article IX of the Illinois Constitution (Cahill's Illinois Revised Statutes 1931) provides that

"The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise. * * *"

The term "local improvement" is not defined, however, either in the Constitution or the statutes. The Supreme Court, however, has laid down this test as the method of distinguishing a local from a general improvement, namely,

What is the primary purpose of the improvement:

If its purpose and effect are to improve a locality it is a local improvement; and

If its primary purpose and effect, such as the erection of a city hall, are to benefit the general public, it is not a local improvement.

The following are some of the leading cases in which the question of a local and a general improvement have been discussed:

STREET SPRINKLING NOT A LOCAL IMPROVEMENT

City of Chicago v. William Blair, 149 Ill. 310 * * * * *

RAILWAY BRIDGE NOT A LOCAL IMPROVEMENT

City of Bloomington v. Chicago and Alton Railroad Co., 134 Ill. 451 * * * * *

STREET VIADUCT—MAY BE BUILT BY SPECIAL ASSESSMENT

Louisville and Nashville Railroad Co., et al. v. City of East St. Louis, 134 Ill. 656 * * * * *

CASUAL MAINTENANCE AND REPAIRING OF STREETS CANNOT
BE DONE BY SPECIAL ASSESSMENT

Eliza Crane et al. v. West Chicago Park Commissioners, 153 Ill. 348 * * * * *

PUMPING STATION AND SEWER SYSTEM IS A
LOCAL IMPROVEMENT

Fisher et al. v. City of Chicago, 213 Ill. 268 * * * * *

RECONSTRUCTION OR REBUILDING OF STREET BY PUTTING ON
NEW TOP OF ASPHALT IS A LOCAL IMPROVEMENT

Bush et al. v. City of Peoria, 215 Ill. 515 * * * * *

STREET WIDENING IS A LOCAL IMPROVEMENT

Village of Glencoe v. Hurford, 317 Ill. 203 * * * * *

BRIDGE OVER CREEK IS NOT A LOCAL IMPROVEMENT

City of Chicago Heights v. Walls et al., 319 Ill. 411 * * * * *

BRIDGE OVER DRY RAVINE NOT LOCAL IMPROVEMENT

City of Waukegan v. Edward P. DeWolf, 258 Ill. 374 * * * * *

Your letter asks to what extent the railroad property may be assessed for the proposed improvement. This question in the abstract is very difficult to answer. Many railroad tracks now run into this terminal, to wit: those of the Chicago and Alton, the Illinois Central, the Atchison, Topeka and Santa Fe, the New York Central Lines, the Chicago, Rock Island and Pacific, and the Chicago and Western Indiana companies. The properties of these railroads may be subject to different restrictions and may be devoted to different uses. If the City Council elects to construct this improvement and to levy a special assessment to defray its cost the time to determine what property will be specially benefited and to what amount will be determined by the officer who makes up the assessment roll, which will be filed in court and to which objections may be presented and be passed on by the County Court. Our Supreme Court has stated that many different elements of value must be considered in determining special assessments against property. If there are no restrictions on the property, the benefits to the property are determined and the property assessed in an amount equal to the increase in the market value of the property for any use to which it may be devoted. If, however, the property is restricted by law to a specific use such as for railroad uses, the general rule is that it can be assessed for increased values arising by reason of the improvement for that use only. But there are certain variations in the application of this rule. The benefits to a railroad right of way proper are measured for assessment by one measuring stick; depots and terminals with another measuring stick; and railroad land, though restricted, where sublet to a private enterprise, by still another stick. So in making up the assessment roll the commissioner before he spreads the assessment must decide the following questions:

- (a) Is the property to be assessed railroad right of way, railroad team tracks, depot grounds or freight terminals?
- (b) What limitations have been placed on the use of the land by the original charter of the particular railroad company?
- (c) Is any of the land, though restricted to railway use, sublet for any other purpose?
- (d) Is any of the land used for and restricted to railroad purposes leased land, the original fee of which is not restricted to railroad uses?

The assessment commissioner must know the use of the land and the restrictions on the land in order to make an assessment which can be sustained.

We will briefly refer to a few of the decisions to illustrate the views of the Supreme Court, as to the rule to be followed in measuring benefits to railroad property.

In *Illinois Central Railroad Co. v. City of Chicago*, 141 Ill. 509, the court held that a railroad right of way could only be assessed for increased values coming to it as a right of way because of the improvement. * * *

The court held the true measure of benefits to be the increased value for the special use to which it was restricted, and that the railroad property could be assessed only to the extent that its fitness for that particular use was increased or enlarged.

A different rule, however, has been laid down by our Supreme Court where lots, though restricted to railroad uses or special uses, are sublet for or used for private purposes.

In *Chicago Union Traction Co. v. City of Chicago*, 204 Ill. 363, the court held that two lots numbered seven and nine, leased to the railway company in a ninety-nine year lease and restricted in their use "for street railway purposes only" could be assessed the same as if privately owned. Lot number nine was occupied by a company power house used for railway purposes; lot number seven was sub-leased for other purposes. The court held that owners of land unrestricted by law could not by private agreement restrict it so as to avoid the obligation of a special assessment. * * *

In *City of Chicago v. Chicago and Northwestern Railway Company*, 278 Ill. 86, the court said at page 90:

"Where land is restricted to a special use, such as railroad right of way, the measure of benefits which it may receive from a local improvement is the increased value of the property for such special use. * * * The test is whether the right of way of the railroad property will be benefited in its market value for the use to which it is being put and not its probably future use. It cannot be taxed upon the benefits thus received."

The same holding was had in *City of Highwood v. Chicago and Northwestern Railway Company*, 276 Ill. 98, where the court held a paving benefited the depot grounds but not the right of way, saying at page 100:

"There may be unusual conditions under which a railroad right of way can be said to be benefited by a local improvement, but as a general rule it cannot be."

The limitations placed on the assessment of railroad property in its different uses is discussed at great length in *City of Lincoln v. Chicago and Alton Railroad Company*, 262 Ill. 11. The property there assessed had four different uses, a 100-foot right of way, an 80-foot strip divided into three blocks, by intersecting streets, one of which was used for a depot, another for a park, the third for a lumber yard. * * *

A reading of the cases cited and many other cases in the books leads to the conclusion that when railroad property is used in its most restricted use, restricted by its charter or law, it can be assessed in one degree. When used in a less restricted way as a depot or terminal it can be assessed in a different degree.

Since, however, the rendition of the above decisions, the General Assembly by an act approved July 7, 1927 (Cahill's Illinois Revised Statutes 1931, page 2256) gave railroad, union depot and terminal companies the power, with the approval of the Illinois Commerce Commission, to develop, sell or lease their air-rights or sub-surface rights when such disposition would not impair the use of the remainder for railroad purposes. This grant of power is revolutionary in its nature as it virtually wipes out the basis upon which the Supreme Court has heretofore rendered its decisions. Railroad property now becomes available, by authority of law, for a higher and better use than its present use and therefore, in our opinion, may now be assessed in a different degree than before the passage of said act. We find no decision of our Supreme Court wherein the court passes upon the method of measuring benefits against railroads since the passage of said act. * * *

As your committee desires our opinion as to the assessments which may

be levied against the railroad property we assume that you desire our views as to the rules of law governing the compensation to be paid a railroad company for crossing its property.

In *Chicago and Northwestern Railway Company v. City of Chicago*, 140 Ill. 309, a judgment of one dollar had been entered as just compensation for property taken and damaged by the city for the extension of West Taylor street across the one hundred foot right of way of the railroad company. The court said at page 317:

"Every railroad company takes its right of way subject to the right of the public to extend the public highways and streets across such right of way."

At page 325:

"There was no error in rendering judgment for a nominal sum, as this may be done where the evidence shows damage; but furnishes no basis for ascertaining the amount."

The method of ascertaining these damages was laid down in the case of *City of Chicago v. Lord et al.*, 276 Ill. 571. There the commissioners allowed two dollars as just compensation for railroad land taken to extend the widened Roosevelt road viaduct over the tracks. The court, in sustaining the award of two dollars, laid down the rule that the test of compensation to be paid, was not the value of the part taken, but whether the part not taken suffered any damage, and if so how much. * * *

In our opinion:

- (1) The city has power to condemn the easements held by the railroad companies so far as necessary to construct the proposed improvement;
- (2) The proposed improvement constitutes a local improvement;
- (3) Abutting railroad property may be assessed in varying degrees dependent on the use and the legal restrictions on that use; and
- (4) The amount to be paid to the railroad companies for the use of their air-rights for street purposes should be nominal inasmuch as the elevated street structure will not injure the remainder of the railroad property devoted to railroad purposes.

Condemnation Judgment Binding: A final condemnation judgment is binding and enforceable against the city even though the city has not, on the day of the judgment order or after the assessments have been either collected or are in default, sufficient money to pay the awards.—*Chicago v. McCluer*, 339 Ill. 610 (1930).

TAKING POSSESSION OF CONDEMNED PROPERTY BY CITY

(No. 6867—*Secretary, Board of Local Improvements—R. S. G.—April 15, 1931—2½ pp.*)

The city cannot take property for improvement purposes until it pays the compensation award made by the court, or procures a court order authorizing the deposit of the compensation with the County Treasurer for the owner's use and actually makes the deposit and obtains an order for possession, or unless the owner consents to the taking of possession by the city before the compensation is paid or deposited.

Citations:

Statute: Cah. '29, 24: 31.

Cases: *Harris v. Chicago*, 162 Ill. 288 (1896).

Chicago v. Roth, 334 Ill. 132 (1929).

Other reference: *Lewis, Eminent Domain*, sec. 837.

AMOUNT PAID FOR CONDEMNED PROPERTY

(No. 7796—City Comptroller—W. T. C.—November 1, 1932—3 pp.)

The city must pay from a street bond fund for the acquisition of land for a local improvement the full amount of the judgment in favor of the property owners including not only the value of the property acquired but the damages to the remainder of the property.

In legal proceedings by the city to acquire land, the value of the part taken and the damages to the remainder can not be separated and should be determined in the same proceedings.

Citations:

Constitution: Illinois, art. II, sec. 13.

Cases: Lake Shore and Michigan Southern R. R. v. Chicago and Western Indiana Ry., 100 Ill. 21 (1884).

Phillips v. Town of Scales Mound, 195 Ill. 353 (1902).

Condemnation, Damages: Where a part of a tract of land is taken for public use, the measure of damages is the decrease in the value of the estate caused by the taking and this includes not only the value of the part actually taken but also the injury to the remaining land. Loss of use of the remaining portion, delay and cost in rehabilitating that portion, and the expense of sidewalk and pavement in front of it are proper matters to be considered when a part of a tract is taken.—Chicago v. Koff, 341 Ill. 520 (1930).

CITY'S LIABILITY FOR DAMAGE TO ABUTTING PROPERTY OWNERS—DOUBLE-DECK STREET IMPROVEMENTS*

(No. 8154—Alderman, 48th Ward—J. W. M.—August 25, 1933—2 pp.)

Where abutting property has been directly or indirectly damaged by a public improvement as by a loss of accessibility to the street or by a loss of light and air, the city is liable to the abutting property owner. The measure of such damages is the difference between the fair cash market value before and the fair cash market value after the improvement, but the city may offset against this any benefits accruing to the property as a result of the improvement.

The construction of an upper or double-decked street would not be an additional burden to the streets and the city would be liable only for the particular damage to each piece of property affected.

Citations:

Constitution: Illinois, art. XI, sec. 13.

Statute: SH '33, 47: 1.

Cases: Palmer v. Union Elevated Railroad, 215 Ill. App. 91 (1920).
Brand v. Union Elevated Railroad, 258 Ill. 133 (1913).
Geohagan v. Union Elevated Railroad, 258 Ill. 352 (1913).
McCoy v. Union Elevated Railroad, 271 Ill. 490 (1915-16).

*See Opinion No. 7666, p. 913, on liability for consequential damages in local improvements.

RIGHT TO DAMAGES AFTER IMPROVEMENT BENEFITS CONFIRMED BY COURT

(No. 8325—*Chairman, Committee on Finance—J. J. S.—March 12, 1934—3½ pp.*)

Where there was a change in a street grade, a judgment decreeing that property was benefited and confirming an assessment does not prevent the owner from pressing a suit for damages due to the improvement as well as for damages due to negligence in constructing the improvement.

Citations:

Statute: SH '33, 24: 789.

Case: Dick and Brothers Quincy Brewing Co. v. City of Quincy, 335 Ill. 368 (1929).

DETERMINATION AND PAYMENT OF CONDEMNATION AWARDS

(No. 8480—*A. A. S.—July 25, 1934—1½ pp.*)

Under the Local Improvement act the court is required to fix the amount of the awards due property owners for property condemned and the amount of the assessments to be levied against property which will be benefited by the proposed improvement.

The City Collector is required to collect assessments levied against property pursuant to the order of court. Funds collected in condemnation proceedings are not retained by the city but are paid to the property owners who are entitled to awards.

The city has no authority to take possession of any property along the line of improvement for which an award has not been paid in full.

FINALITY AND PAYMENT OF CONDEMNATION

(No. 7896—*City Comptroller—J. J. S.—January 13, 1933—1½ pp.*)

All judgments in condemnation cases become final against the city after ninety days whether any assessments are collected or not.

Money collected need not be prorated among the different property owners interested in a condemnation proceeding.

Citation:

Case: Rothschild v. Village of Calumet Park, 350 Ill. 330 (1933).

CONVEYANCE OF PROPERTY ACQUIRED BY EXCESS CONDEMNATION

(No. 6588—*City Comptroller—R. N. L.—January 20, 1930—2½ pp.*)

Private property of the city, acquired by excess condemnation in connection with a local improvement, can be conveyed only under the statutes covering the sale, lease, or transfer of real and personal property, and not by means of a vacation ordinance.

Citation:

Statute: Cah. '29, 24: 648-650.

(2) *Payment of Condemnation Awards*

INTEREST ON CONDEMNATION AWARDS

(No. 8910—*President, Board of Local Improvements—A. A. S.—November 6, 1935—1½ pp.*)

The city must pay a condemnation award and interest thereon from the date of the judgment.

Citation:

Case: *Mecartney v. Chicago*, 273 Ill. 276 (1916).

Interest on Condemnation Judgments: Interest must be paid on condemnation judgments from the date the judgment becomes final, regardless of the date the city takes actual possession of the property.—*Feldman v. Chicago*, 263 Ill. 247 (1936).

Payment of Condemnation Judgments: Since the Constitution guarantees compensation for property taken for public purposes, a condemnation judgment holder is entitled to a writ of mandamus to compel payment of this judgment out of the city's judgment tax fund where no other judgment creditor is objecting; the city cannot refuse payment on the ground that prior judgments must be paid first out of said fund and the fund is insufficient to pay all outstanding judgments.—*People v. Kelly*, 361 Ill. 54 (1935).

PAYMENT OF CONDEMNATION AWARDS WHERE CITY HAS COUNTERCLAIMS

(No. 7227—*City Comptroller—L. H.—October 28, 1931—2½ pp.*)

As the city cannot obtain possession of the property which it has condemned until it has paid for the property, it will be necessary to make payment in due course on the condemnation vouchers, regardless of the fact that the city has counterclaims which it may ultimately reduce to judgment against the property owners.

The city's claims against a railroad company for the use and occupation of switch tracks are unliquidated and cannot be set off against the condemnation award in favor of the railroad company which has

been reduced to judgment until the city's claims have likewise been reduced to judgment.

COLLECTION OF DIFFERENCE BETWEEN AMOUNT OF CONDEMNATION AWARD AND SPECIAL ASSESSMENT

(No. 8494—A. A. S.—August 22, 1934—1 p.)

Where an award due a property owner for property taken for a public improvement is greater than the amount assessed against the property for such improvement, or where the benefit is greater than the award, only the difference shall be paid to or collected from such owner.

Citation:

Statute: Local Improvement act, sec. 16.

WAIVER OF CASH PAYMENT OF CONDEMNATION AWARD

(No. 6757—City Comptroller—C. J. A.—August 19, 1930—4 pp.)

A written waiver by the owners of property condemned for a local improvement of their constitutional right to receive cash payment for such property and an acceptance of city bonds at par in lieu thereof, has the same legal effect as though the Comptroller had first sold the bonds to some third party and then paid over the proceeds to the owners of such condemned property.

Citations:

Constitution: Illinois, art. II, sec. 13.

Statute: Local Improvement act, sec. 42a (as amended), 87.

LIABILITY OF CITY UPON FAILURE TO PAY CONDEMNATION AWARDS UNDER THE EMINENT DOMAIN ACT

(No. 8597—City Comptroller—J. W. M.—December 21, 1934—4 pp.)

Where the city institutes condemnation proceedings and the court makes a condemnation award which the city fails to pay, it must be decided whether the city has abandoned the proceedings or whether the award stands as a general judgment against it; in the former case, the city is liable for all costs of the respondents in connection with the proceedings, such as attorney's fees, but in the latter case, the city must pay the amount of the award from the corporate funds.

PAYMENT OF CONDEMNATION AWARD WHEN A MECHANIC'S LIEN IS CLAIMED

(No. 8267—City Comptroller—V. A. K.—January 10, 1934—3 pp.)

The City Comptroller may pay to a person compensation due him for land condemned to widen a street upon the receipt from him of an agreement to hold the city harmless from the claim of anyone who may assert a mechanic's lien against that money, since the contractor who claimed such a lien has failed to file his notice or to start suit within the time fixed by statute.

Citations:

Statute: Lien act, sec. 7.

Case: Zander Reum Co. v. Congregation B'Nei Moshe, 159 Ill. App. 372 (1911).

ADVANCES FROM UNUSED FUNDS TO PAY CONDEMNATION AWARDS

(No. 7755—City Comptroller—J. J. S.—September 22, 1932—2 pp.)

Where an ordinance has been passed ordering an advance of money from unused funds to pay for lands condemned before the assessment is collected and the Board of Local Improvements deposits a pledge of security with the City Comptroller to the entire extent of the special assessment, the pledge need bear no interest and the City Comptroller must honor the improvement vouchers against the advance whether or not he knows that sufficient special assessment money will be collected to reimburse the advance.

Citation:

Statutes: Cah. '31, 24: 1001.

SH '31, 24: 666.

CHAPTER XV

CITY'S LIABILITY FOR DAMAGE AND INJURY

INTRODUCTORY

A policeman is pursuing a bandit, shots are exchanged and a stray bullet passes through a bystander's leg. A water main breaks and floods neighboring property. The Fire Department in endeavoring to check a fire, damages a nearby house. A city truck is traveling along the streets and injures a pedestrian. In these and other cases of injury caused by the city or its employees, effort is frequently made to recover damages and the question of liability arises.

In the preliminary determination of whether the city is liable for physical or material losses suffered, the same principles of law apply as in the case of claims against private individuals. To establish liability, negligence must be proven. If the city or its employees have exercised due care, the city is not liable. Even if negligence is proven, a contributory negligence on the part of the injured claimant would destroy liability under Illinois law. Then too, where injury occurs from such causes as defective streets, it must be proven that the city has received actual or implied notice of the defect. These are the cardinal principles familiar to all lawyers in determining whether liability for damage or injury exists.

Where the city is concerned, however, an additional distinction is applied. When the city is exercising a governmental, as distinguished from a corporate, function, it is not liable even though negligent. A governmental function comprehends any exercise of sovereign police power—activities undertaken in behalf of public health, safety or welfare.

In earlier times, the distinction between governmental and corporate was comparatively simple. The administration of a police department or a fire department were recognized as clearly governmental. Today, the range of urban activities is expanded far beyond its earlier limits. New activities in such fields as traffic control, recreation and sanitation impose a severe strain upon legal reasoning and the courts of the various states often disagree as to whether an activity is corporate or governmental.

In addition to the above common law principles governing municipal liability, there are state statutes on the subject. Statute has established municipal liability for damages caused by mob violence. By state act, the city is also held liable for damage caused by the negligent operation of fire vehicles. While this latter act has been challenged upon constitutional grounds, its validity has not been decided in the higher state courts.

A. GOVERNMENTAL FUNCTIONS

(1) *Fire Activities*

LIABILITY FOR NEGLIGENCE OF FIREMEN AND POLICEMEN

(No. 6426—*Chairman, Committee on Finance—J. R.—May 2, 1929—1 p.*)

The city is not liable for negligent acts of officers or employees of the Fire and Police Departments committed in the discharge of their duties.

Citations:

- Cases:** Culver v. City of Streator, 130 Ill. 238 (1889-90).
Chicago v. Williams, 182 Ill. 135 (1899).
Wilcox v. Chicago, 107 Ill. 334 (1883).
Nicastor v. Chicago, 175 Ill. App. 634 (1913).
Tollefson v. City of Ottawa, 238 Ill. 134 (1909).

Opinions No. 6504 of September 11, 1929 and No. 6529 of October 23, 1929 and No. 6425 of May 2, 1929, all to the chairman of the Committee on Finance are in accord with the above opinion.

LIABILITY FOR DAMAGES BY FIRE DEPARTMENT

(No. 8517—*Chairman, Committee on Finance—E. L. M.—October 5, 1934—2 pp.*)

The maintenance and operation of the Fire Department by the city is an exercise of its police power and the city is not liable for damages arising out of the exercise of such police power.

Citations:

- Cases:** Wilcox v. Chicago, 107 Ill. 334 (1883).
Craig v. City of Charleston, 180 Ill. 154 (1899).
Chicago v. Williams, 182 Ill. 135 (1899).
Johnson v. Chicago, 258 Ill. 494 (1913).

Opinions No. 6531 and No. 6530, both of October 23, 1929, and No. 6844 of March 4, 1931, all to the chairman of the Committee on Finance are in accord with the above opinion.

LIABILITY FOR DAMAGES BY FIRE ALARM MAINTENANCE

(No. 8383—*Chairman, Committee on Finance—E. L. M.—May 10, 1934—3½ pp.*)

The city, when acting in a governmental capacity, is not liable for damages incurred.

The operation and maintenance of the Fire Department is govern-

mental in character and the installation and care of a fire alarm system is essential to such operation and maintenance.

The city is not liable for damages arising out of a collision with a city truck when the driver was returning from repairing the fire alarm system.

Citations:

- Cases: Wilcox v. Chicago, 107 Ill. 334 (1883).
Chicago v. Williams, 182 Ill. 138 (1899).
Chicago v. Selz, Schwab and Co., 202 Ill. 545 (1903).
Tollefson v. City of Ottawa, 228 Ill. 134 (1907).
Other references: 6 McQuillin, Mun. Corp., sec. 2792, p. 758.
Id., sec. 2796, p. 776.

LIABILITY FOR DAMAGES IN TRIMMING TREES

(No. 8588—Chairman, Committee on Finance—E. L. M.—December 11, 1934—3½ pp.)

The city is not liable for damages caused by an employee engaged in trimming trees in order to prevent interference with the effective operation of the police and fire alarm system, as this work is a governmental function.

Citations:

- Cases: Wilcox v. Chicago, 107 Ill. 334 (1883).
Chicago v. Williams, 182 Ill. 135 (1899).
Chicago v. Selz, Schwab and Co., 202 Ill. 545 (1903).
Tollefson v. City of Ottawa, 228 Ill. 134 (1907).
Other reference: 6 McQuillin, Mun. Corp., pp. 758, 776.

LIABILITY FOR DAMAGES IN EXTINGUISHING A FIRE

(No. 7456—Acting Fire Commissioner—Jud. G.—February 23, 1932 2 pp.)

The city is not liable for damages caused by employees of the Fire Department while in the act of extinguishing a fire.

Citations:

- Cases: Chicago v. Williams, 182 Ill. 137 (1899).
Perry v. City of Oregon, 139 Ill. App. 606 (1908).
Wilcox v. Chicago, 107 Ill. 334 (1883).
Jennings v. County of Peoria, 196 Ill. 197 (1902).

LIABILITY FOR DAMAGES IN EXTINGUISHING A FIRE

(No. 8357—Chairman, Committee on Finance—E. L. M.—April 4, 1934 1½ pp.)

The maintenance of the Fire Department is an exercise of the city's police power and the city is not liable for damages to property caused

by the Fire Department when extinguishing a fire even though the property is not directly involved in the fire.

Citations:

- Cases:** Wilcox v. Chicago, 107 Ill. 334 (1883).
Culver v. City of Streator, 130 Ill. 238 (1889-90).
Craig v. City of Charleston, 180 Ill. 154 (1899).
Chicago v. Williams, 182 Ill. 135 (1899).
Johnson v. Chicago, 258 Ill. 494 (1913).

**LIABILITY IN FAILING TO SUPPLY WATER TO
EXTINGUISH A FIRE**

(No. 8326—*Chairman, Committee on Finance—E. L. M.—March 12, 1934—4 pp.*)

The city is not liable for injuries growing out of its negligence in failing to supply water to extinguish a fire.

Citations:

- Case:** Wallace v. Mayor and City Council of Baltimore, 123 Md. 638 (1914).
Other references: Dillon, Mun. Corp., sec. 66.
McQuillin, Mun. Corp., sec. 2682.
Farnham, Waters, sec. 158c.

(2) Police Activities

**LIABILITY FOR NEGLIGENCE OF POLICE DEPARTMENT
MEMBERS**

(No. 8689—*Chairman, Commissioner on Finance—E. L. M.—March 1, 1935—2 pp.*)

The city is not liable for the negligent acts of officers or men employed in the Police Department while discharging their duties, as the police perform a governmental function.

Citations:

- Case:** Culver v. City of Streator, 130 Ill. 238 (1889-90).

Opinions No. 6442 of June 3, 1929, No. 6728 of July 25, 1930, No. 6450 of June 13, 1929, No. 8226 of November 24, 1933, and No. 8931 of November 18, 1935, all to the chairman of the Committee on Finance are in accord with the above opinion.

**LIABILITY FOR INJURIES BY POLICEMEN IN PURSUIT
OF CRIMINALS**

(No. 8798—*Chairman, Committee on Finance—J. A. S.—June 19, 1935—2½ pp.*)

The city is not liable for damage caused by police officers pursuing and apprehending criminals or suspicious characters, as in that pur-

suit and apprehension the police officers are performing a governmental function and the city cannot be held liable for injuries resulting from the performance of a governmental function.

Citations:

- Cases:** Wilcox v. Chicago, 107 Ill. 334 (1883).
Culver v. City of Streator, 130 Ill. 238 (1889-90).
Johnston v. Chicago, 258 Ill. 494 (1913).

Opinions No. 7885 of January 5, 1933, No. 8406 of May 24, 1934, No. 8784 of June 3, 1935, No. 8232 of December 7, 1933, No. 8126 of July 21, 1933, all to the Chairman of the Committee on Finance are in accord with the above opinion.

LIABILITY FOR INJURY BY POLICEMEN IN COMBAT WITH BANDIT

(No. 8516—Chairman, Committee on Finance—E. L. M.—October 5, 1934—2 pp.)

The city is not liable for, nor can the City Council provide compensation for injuries or damages suffered through the acts of a police officer in combat with a bandit.

Citations:

- Cases:** Chicago v. Williams, 182 Ill. 135 (1899).
Culver v. City of Streator, 130 Ill. 238 (1889-90).
Arms v. City of Knoxville, 32 Ill. App. 604 (1889-90).
Chicago v. Pittsburgh, Cincinnati, Chicago and St. Louis Ry., 244 Ill. 220 (1910).

Opinion No. 7356 of December 8, 1931, to the Committee on Finance is in accord with the above opinion.

LIABILITY FOR SHOOTING BY POLICEMAN

(No. 8375—Chairman, Committee on Finance—A. F. G.—April 27, 1934—2 pp.)

The city is not liable for damages when acting in its governmental capacity or in the exercise of its police powers.

The city is not liable for personal injuries caused by the exchange of shots between a policeman and bandits.

Citations:

- Cases:** Wilcox v. Chicago, 107 Ill. 334 (1883).
Culver v. City of Streator, 130 Ill. 238 (1889-90).
Craig v. City of Charleston, 180 Ill. 154 (1899).
Chicago v. Williams, 182 Ill. 135 (1899).
Johnston v. Chicago, 258 Ill. 494 (1913).

LIABILITY FOR SHOOTING BY POLICEMAN

(No. 8629—Chairman, Committee on Finance—E. L. M.—January 18, 1935—2 pp.)

The city is not liable for damages resulting for an exchange of shots between a police officer and a bandit in the vestibule of a private home, where the bandit had concealed himself, since the city is not liable for the acts of its police officers.

Citations:

- Cases: Chicago v. Williams, 182 Ill. 135 (1899).
Culver v. City of Streator, 130 Ill. 238 (1889-90).
Arms v. City of Knoxville, 32 Ill. App. 604 (1889-90).
Chicago v. Pittsburgh, Cincinnati, Chicago, and St. Louis Ry., 244 Ill. 220 (1910).

LIABILITY FOR SHOOTING BY POLICEMAN

(No. 7619—Chairman, Committee on Finance—C. J. A.—June 22, 1932—3 pp.)

The city is not liable for damage caused by a stray bullet fired by a policeman endeavoring to apprehend a suspect in a stolen automobile, as the city is not liable for the acts of its officers who are performing a governmental function.

Citations:

- Cases: Wilcox v. Chicago, 107 Ill. 334 (1883).
Culver v. City of Streator, 130 Ill. 238 (1889-90).
Craig v. City of Charleston, 180 Ill. 154 (1899).
Chicago v. Williams, 182 Ill. 135 (1899).
Johnston v. Chicago, 258 Ill. 494 (1913).

Opinion No. 7748 of September 20, 1932, to the Chairman of the Committee on Finance is in accord with the above opinion.

COMPENSATION FOR INJURIES BY POLICEMAN

(No. 8443—Chairman, Committee on Finance—E. L. M.—June 26, 1934—2½ pp.)

The city is not liable for damages arising from the acts of its police officers.

Revenues of the city must be held for corporate purposes only and innocent persons injured by a policeman while on duty cannot be compensated from public funds.

Citations:

- Cases: Chicago v. Williams, 182 Ill. 135 (1899).
Culver v. City of Streator, 130 Ill. 238 (1889-90).
Arms v. City of Knoxville, 32 Ill. App. 604 (1889-90).
Chicago v. Pittsburgh, Cincinnati, Cleveland and St. Louis Ry., 244 Ill. 220, 230 (1910).

LIABILITY FOR ILLEGAL ACTIONS OF POLICE OFFICERS—FALSE ARREST

(No. 6666—*Chairman, Finance Committee—H. M. S.—May 10, 1930*
—1½ pp.)

The city is not liable for illegal or negligent acts of the officers and employees of the police department done in discharge of their duties.

A policeman is not entitled to reimbursement for damages that he had to pay in a false arrest suit.

Citations:

- Cases: Wilcox v. Chicago, 107 Ill. 334 (1883).
Culver v. Chicago, 130 Ill. 238 (1889-1890).
Chicago v. Williams, 182 Ill. 135 (1899).

LIABILITY FOR NEGLIGENT OPERATION OF POLICE PATROL WAGON

(No. 8418—*Chairman, Committee on Finance—E. L. M.—June 4, 1934*
—2½ pp.)

The city is not liable for the negligent acts of officers or men employed in the police department while in the discharge of their duties; hence the city is not liable for damages caused by careless operation of a police patrol wagon when used to pick up a woman who had attempted suicide.

Citations:

- Cases: Chicago v. Williams, 182 Ill. 135 (1899).
Culver v. City of Streator, 130 Ill. 238 (1889-90).
Arms v. City of Knoxville, 32 Ill. App. 604 (1889-90).
Wilcox v. Chicago, 107 Ill. 334 (1883).
Craig v. City of Charleston, 180 Ill. 154 (1899).
Johnston v. Chicago, 258 Ill. 494 (1913).

LIABILITY FOR DAMAGES IN MAINTENANCE OF POLICE STATION

(No. 8474—*Chairman, Committee on Finance—E. L. M.—July 17, 1934—3½ pp.*)

The city is not liable for damages caused by the exercise of its governmental functions.

The city in constructing and maintaining police stations is exer-

cising a governmental function and it is not liable for damages resulting in connection therewith.

Citations:

- Cases:** Normal School v. City of Charleston, 271 Ill. 606 (1915-16).
 Evans v. City of Kankakee, 231 Ill. 227 (1907-08).
 Town of Odell v. Schroeder, 58 Ill. 353 (1871).
 Blake v. City of Pontiac, 49 Ill. App. 552 (1893).
 Chicago v. Selz, Schwab and Co., 202 Ill. 545 (1903).
 Tollefson v. City of Ottawa, 228 Ill. 134 (1907).
Other reference: 6 McQuillin, Mun. Corp., sec. 2813, p. 824.

Opinion No. 8257 of January 3, 1934, to the Chairman of the Committee on Finance is in accord with the above opinion.

LIABILITY FOR DAMAGES IN OPERATION OF POLICE BUILDING

(No. 7972—Chairman, Committee on Finance—E. L. M.—March 20, 1935—6½ pp.)

The city is not liable for damage to a fur coat caused by a loose screw protruding from the frame of an elevator door in the Central Police and Courts building.

The erection and maintenance of a building for police purposes is a governmental function of the city, and the city is not liable for the negligent acts of its officers or agents maintaining and operating that building.

Citations:

- Statute:** Cities and Villages act, art. V, sec. 86.
Cases: People v. Chicago, 256 Ill. 558 (1912-13).
 Evans v. City of Kankakee, 231 Ill. 223 (1907-08).
 Chicago v. Williams, 182 Ill. 135 (1899).
 Rombos, Administrator v. Chicago, 332 Ill. 70 (1929).
 Johnston v. Chicago, 258 Ill. 494 (1913).
 Consumers Co. v. Chicago, 313 Ill. 408 (1925).
 Gebhardt v. Village of La Grange Park, 354 Ill. 234 (1934).
Other reference: 6 McQuillin, Mun. Corp., p. 824.

OPINION OF FOREGOING SYNOPSIS

We have your letter together with council paper and correspondence in the claim for damage to fur coat. You request an opinion as to the liability of the city in the premises.

It is stated that on November 15, 1934, while she was a passenger in an elevator car in the Central Police and Courts building, 1121 S. State street, her fur coat was torn and damaged due to catching on a loose screw that was protruding from the framework of the elevator door.

The operator of the elevator reports:

"At about 8:15 P. M. Nov. 15 a party of two men and one woman entered my car. I took them up to the eleventh floor on which floor the "Showup" is held. As I opened the door, all three passengers rushed out abreast. This caused the woman passenger to rub against the frame of the elevator door. She turned around and said that she had torn the

sleeve of her fur coat on a small screw which holds in place a vertical rubber tubing imbedded on the edge of the frame work of the elevator door. I noticed that these people were late for the "Showup" and therefore in a great hurry. Had they taken their time in leaving the car the damage, a four inch tear in the sleeve, would not have happened."

The operating engineer of the building, in reference to the occurrence, states:

"I investigated at once and found the screw loose. I could not tighten this screw because the threads were stripped. I replaced the old screw with a new one and immediately made out my report covering the accident."

The Central Police and Courts building was erected and is maintained and operated by the City of Chicago for the police department and police court activities and is used solely for that purpose. The building was erected under the power granted to the city by section 86 of article V, chapter 24 of the Cities and Villages act which reads: "To provide for the erection and care of all public buildings necessary for the use of the city or village."

A municipal government has a double function, first the private, proprietary function and second the governmental function as the arm or agent of the state. The Illinois Supreme Court has pointed out the distinguishing features of such municipal functions in the following language:

"The City of Chicago is a municipal corporation organized under the authority of the state for the purpose of local government subsidiary to the state. The corporation proper embraces both the territory and its inhabitants. It acts in a two-fold capacity and exercises two kinds of power—one governmental and the other private. In its governmental capacity it is the agent of the state, and assists in the government of the territory incorporated by making laws and regulations with respect to its local and internal concerns. In its private capacity it represents those proprietary interests that appertain to it in common with other corporations. It makes contracts, employs men, owns property and transacts business in the same way as individuals and private corporations. In this capacity it may sue and be sued, and is governed by the same laws and rules and subject to the same regulations and limitations that natural persons are, except so far as it may be exempt by express enactment. (*Gale v. Village of Kalamazoo*, 1 Mich. N. P. 5; *Western Lunatic Asylum v. Miller*, 29 W. Va. 326; 6 Am. St. Rep. 644.) It is this dual relation which municipalities bear to the sovereign power that confuses the mind and gives rise to the difficulties encountered in fixing the responsibility for acts performed and unperformed. 'When power conferred has relation to public purposes, and for the public good it is to be classified as governmental in its nature and appertains to the corporation in its political capacity, but when it relates to the accomplishment of private purposes, in which the public is only indirectly concerned, it is private in its nature, and the municipality, in respect to its exercise, is regarded as a legal individual. In the former case the corporation is exempt from all liability, whether for non-user or mis-user, while in the latter case it may be held to that degree of responsibility which would attach to an ordinary corporation.' (1 *Smith's Modern Law of Mun. Corp.* 785. See, also, 2 *Dillon on Mun. Corp.*—4th ed.—sec. 966.)"

The People v. City of Chicago, 256 Ill. 558, at pages 562 and 563.

There are some duties the nature of which as governmental is too well settled to be disputed, such as the establishment and maintenance of schools, hospitals, fire and police departments, jails, workhouses, police stations and the like. In fact, duties connected with the preservation of the safety, peace, health or the prevention of the destruction of property by fire are all governmental duties without question, and hence there is no municipal liability for torts in connection therewith, or at least not under ordinary circumstances.

In distinguishing between the corporate or ministerial acts of a municipal corporation and its governmental functions, McQuillin in his work on municipal corporations says at page 824 of volume 6:

"Jails, workhouses, and police stations. In erecting, maintaining and managing jails, workhouses and police stations, according to judicial decisions, the municipality is exercising a purely governmental function.
* * *"

In considering the relation of the erection and maintenance of police buildings to the police power of a city our Supreme Court has said:

"The law is well settled that the police regulations of a city are not made or enforced in the interests of the city in its private capacity but in the interests of the public, and that a city is not liable for the acts of its officers in attempting to enforce police regulations; (citing authorities) and police regulations, it has frequently been said, include the making and enforcement of all such laws, ordinances and regulations as pertain to the comfort, safety, health, convenience, good order and welfare of the public, and that all persons officially charged with the execution and enforcement of such police ordinances and regulations are, *quod hoc*, police officers. (Culver v. City of Streator, *supra*.) We think it clear, therefore, that the establishment and maintenance of a city calaboose falls within the proper exercise of the police power of a city, and that a city is not liable in an action on the case for damages for the wrongful or negligent acts of its police officers or board of health in the management of a calaboose or the detention of persons confined therein, even though such persons be afflicted with small-pox and persons who work or reside near the calaboose contract said disease * * *"

Evans v. City of Kankakee, 231 Ill. 223.

And the same court in passing on the question of the liability of municipalities for the negligent acts of officers in their public capacity has said:

"There is an implied or common law liability for the negligence of municipal officers in the performance of corporate acts, which have relation to the management of the corporate or private concerns of the municipality, from which it derives special or immediate profit or advantage as a corporation. But where acts are done by the officers of towns and cities in their public capacity in the discharge of duties imposed by the law for the public benefit and for the promotion and preservation of the public welfare, no private action lies unless the right to bring it is expressly conferred."

City of Chicago v. Williams, 182 Ill. 135.

In a later case the court has said:

"A city in the use of the police powers conferred upon it by the legislature does not act in its private capacity or in the local interest but in the exercise of a governmental function—a part of the political and governmental authority of the state and in the general public interest—and it is therefore not liable for the acts of its officers in the enforcement of police regulation. * * *

"Police regulations include ordinances passed for the purpose of securing the safety, health, welfare and good order of the public, and persons charged officially with the execution and enforcement of such orders are engaged in the performance of a public duty, and the city, under whose authority they act, is not liable for injuries negligently caused by them in the performance of such duties."

Roumbos Admr. v. City of Chicago, 332 Ill. 70.

The grounds of exemption from liability for injury arising out of the negligence of municipal employees engaged in a governmental function are that the city is engaged in the performance of a public service in which it has no particular interest and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed

in pursuance of a duty imposed by law for the safety and general welfare of the inhabitants or of the community; that employees engaged in the operation and maintenance of its police department, although appointed by the municipality are not, when acting in the discharge of their duties, servants or agents in the employment of the city for whose conduct the city can be held liable, but they act rather as public officers or officers of the city charged with a public service for whose negligence or misconduct in discharge of official duty no action will lie against the city unless expressly given, and hence the maxim of *respondeat superior* has no application. This principle has been consistently followed by our courts in a great number of cases, among which are:

Wilcox v. City of Chicago, 107 Ill. 334.
 City of Chicago v. Williams, 182 Ill. 135.
 City of Chicago v. Selz, Schwab and Co., 202 Ill. 545.
 Tollefson v. City of Ottawa, 228 Ill. 134.
 Johnston v. City of Chicago, 258 Ill. 494.
 Consumers Co. v. City of Chicago, 313 Ill. 408.
 Rombos, Admr. v. City of Chicago, 332 Ill. 70.
 Gebhardt v. Village of LaGrange Park, 354 Ill. 234.

We are therefore of the opinion that the City of Chicago is not liable for the injury to her fur coat complained of.

* * * * *

LIABILITY FOR SALE OF UNCLAIMED PROPERTY

(No. 6914—Chairman, Committee on Finance—J. W. B. S.—May 23, 1931—3 pp.)

The city is not liable to the owners for unclaimed property seized by the police and sold at public auction in accordance with the provisions of the city ordinances:

Citations:

Ordinance: Code '22: 3095.

LIABILITY FOR AUCTION OF SEIZED CARS WITHOUT NOTICE

(No. 6905—Chairman, Committee on Finance—J. W. B. S.—May 19, 1931—3 pp.)

The city is liable to the owner for the reasonable value of an automobile seized as an abandoned car and sold at auction without notice to the owner and before the expiration of thirty days.

Citations:

Statutes: Cah. '29, 82: 50.

Id. 95a: 36(1).

Cases: Schwartz v. Clark, 136 Ill. App. 150 (1908).

Taylor v. Welsh, 138 Ill. App. 190 (1908).

LIABILITY FOR DAMAGE BY DOG CATCHERS

(No. 8213—Chairman, Committee on Finance—C. N.—November 14, 1933—1½ pp.)

The city is not liable for damage caused by dog catchers throwing a dog through a store window. Dog catchers in the regular exercise of their duties are considered policemen and the city is not liable for the acts of its policemen in the performance of their duties.

Citation:

Reference: 3 McQuillin, Mun. Corp. (2nd ed.), sec. 1004.

(3) Garbage Collection and Disposal**LIABILITY FOR NEGLIGENCE IN THE COLLECTION AND DISPOSITION OF GARBAGE**

(No. 8258—Chairman, Committee on Finance—E. L. M.—January 3, 1934—7½ pp.)

The city in the collection and disposition of garbage is acting under the police powers of the state and is not liable for injuries caused by the negligent performance of that function or any acts necessary and incidental to that function.

Citations:

Statute: Cah. '31, 24: 65(78).

Cases: City Trust and Savings Bank v. City of Kankakee, 254 Ill. App. 489 (1929).

Behrmann v. St. Louis, 273 Mo. 578 (1918).

Montain v. Fargo, 38 N. D. 432 (1917).

Bedtke v. Chicago, 240 Ill. App. 493 (1926).

Wilcox v. Chicago, 107 Ill. 334 (1883).

Consumers Co. v. Chicago, 313 Ill. 408 (1925).

Other reference: 6 McQuillin, Mun. Corp., secs. 2792, 2801.

Opinions No. 8238 of December 13, 1933, No. 8864 of September 4, 1935, No. 8351 of March 31, 1934, No. 8665 of February 6, 1935, No. 8442 of June 26, 1934, No. 8452 of July 2, 1934, and No. 8858 of September 3, 1935 all to the Chairman of the Committee on Finance are in accord with the above opinion.

Liability for Garbage Collection: The city is liable for injuries caused by the negligent driving of a city's garbage truck as the city, in the removal of garbage and operation of trucks and trailers for that purpose, is not engaged in a governmental function.—Wasilevitsky v. Chicago, 280 Ill. App. 531 (1935). This point has not been decided in the Illinois Supreme Court since the above case.

LIABILITY FOR DAMAGES BY GARBAGE TRUCK

(No. 8954—*Chairman, Committee on Finance—E. L. M.—December 9, 1935—3 pp.*)

The city is not liable for damage done to property by its garbage truck and trailers, as the city is engaging in a governmental capacity when it collects and disposes of garbage.

Citations:

Case: *Consumers Co. v. Chicago*, 313 Ill. 408 (1925).

Other reference: 6 McQuillin, Mun. Corp., sec. 2796, p. 775.

Opinions No. 8250 of December 20, 1933, No. 8378 of May 3, 1934, No. 8800 of June 24, 1935, No. 8812 of July 12, 1935, No. 8909 of November 4, 1935, No. 8929 of November 18, 1935, No. 8942 of November 21, 1935 and No. 8416 of June 4, 1934, all to the Chairman of the Committee on Finance, are in accord with the above opinion.

**LIABILITY FOR DAMAGES WHILE TRANSPORTING
EMPLOYEES FOR GARBAGE COLLECTION**

(No. 8926—*Chairman, Committee on Finance—E. L. M.—November 15, 1935—3½ pp.*)

The city is not liable for damages caused to an automobile by one of its trucks transporting relief workers who were doing the city's work in connection with the loading of garbage and ashes, as the city was operating in its governmental capacity of collecting and disposing of garbage.

Citations:

Cases: *Consumers Company v. Chicago*, 313 Ill. 408 (1925).

Gebhardt v. Village of LaGrange Park, 354 Ill. 234 (1934).

Other reference: 6 McQuillin, Mun. Corp., sec. 2796, p. 775.

LIABILITY FOR DAMAGES BY GARBAGE TRUCK

(No. 8727—*Chairman, Finance Committee—E. L. M.—March 22, 1935—3 pp.*)

The city is not liable for damage resulting from the negligence of a city truck driver engaged in collecting garbage, as the collection of garbage is a governmental function.

Citations:

Case: *Consumers Co. v. Chicago*, 313 Ill. 408 (1925).

Other reference: 6 McQuillin, Mun. Corp., p. 775.

(4) *Other Governmental Functions*

LIABILITY FOR ACCIDENTS ON RECREATIONAL GROUNDS

(No. 8757—*Commissioner of Public Works*—O. W. H.—April 29, 1935—1½ pp.)

The use of property by the city for recreational purposes is a governmental function, and the city is not liable for any accidents arising out of that use.

Citation:

Case: Gebhardt v. Village of LaGrange Park, 354 Ill. 234 (1934).

LIABILITY FOR INJURIES IN MAINTAINING PLAYGROUNDS

(No. 8964—*Chairman of Finance Committee*—S. A.—December 11, 1935—1 p.)

The operation of a playground by the city is a governmental function and it is not liable for the negligence of its agents in such activity.

Citations:

Cases: Gebhardt v. Village of LaGrange Park, 354 Ill. 234 (1934).
Johnson v. Chicago, 278 Ill. App. 629 (1934-35).

LIABILITY FOR DAMAGE BY BALL PLAYING IN PARK

(No. 7643—*Chairman, Committee on Finance*—Jud. G.—July 8, 1932—2½ pp.)

The city is engaged in a governmental function in operating parks and hence is not liable for damage to adjacent private property caused by ball game activities in a park.

It is doubtful whether ball playing in a city park is such a nuisance as should be abated.

Citation:

Case: Pease v. Parsons, 273 Mass. 111 (1930).

**LIABILITY OF HEALTH ADMINISTRATION—IMPROPER
INOCULATION**

(No. 8490—*Chairman, Committee on Finance*—E. L. M.—August 14, 1934—2½ pp.)

The preservation of public health and the care of the sick are governmental functions and the city cannot be made liable for the negligence of its agents in the performance of its governmental functions.

The city is not liable for the costs of private medical care required by a child who had been improperly inoculated for diphtheria by a city physician, and the City Council has no power to appropriate or expend public funds for this purpose.

Citations:

- Cases:** Chicago v. Seben, 165 Ill. 371 (1897).
Chicago v. Williams, 182 Ill. 135 (1899).
Evans v. City of Kankakee, 231 Ill. 223 (1907-08).
Tollefson v. City of Ottawa, 228 Ill. 134 (1907).

LIABILITY FOR DAMAGES BY BOARD OF HEALTH AUTOMOBILE

(No. 8928—*Chairman, Committee on Finance—E. L. M.—November 18, 1935—2½ pp.*)

The city, in the performance of duties that relate to the preservation of the public health and care of the sick, acts in a governmental or public capacity. Hence it is not liable for the damage to property caused by an automobile of the Board of Health that was conveying samples of human milk from the Women and Children's Hospital to the Board of Health.

Citations:

- Cases:** Chicago v. Seben, 165 Ill. 371 (1897).
Chicago v. Williams, 182 Ill. 135 (1899).
Evans v. City of Kankakee, 231 Ill. 223 (1907-08).
Tollefson v. City of Ottawa, 228 Ill. 134 (1907).

LIABILITY FOR REMOVAL OF HEALTH OBSTRUCTIONS ON CITY PROPERTY

(No. 8851—*Chairman, Committee on Finance—E. L. M.—August 17, 1935—7 pp.*)

The city is not liable for the removal and destruction of a boiler used as a toilet on public property since the city in removing and destroying the boiler acted in its governmental capacity to protect the public health, and in performing a governmental function it cannot be held liable for its own negligence or wrongful conduct, or the negligence or wrongful conduct of its employees.

Citations:

- Statute:** Cah. '33, 24: 65(78).
Cases: Gebhardt v. Village of LaGrange Park, 354 Ill. 234 (1912).
Johnston v. Chicago, 258 Ill. 494 (1913).
Chicago v. Williams, 182 Ill. 135 (1899).
Evans v. Kankakee, 231 Ill. 223 (1907-08).
Wilcox v. Chicago, 107 Ill. 334 (1883).
Chicago v. Seiz, Schwab and Co., 202 Ill. 545 (1903).
Roumbos, Administrator v. Chicago, 332 Ill. 70 (1929).
Consumers Co. v. Chicago, 313 Ill. 408 (1925).
Other reference: 6 McQuillin, Mun. Corp., secs. 2792, 2796.

LIABILITY FOR NEGLIGENT CLEANING OF CATCHBASINS

(No. 7130—*Chairman, Committee on Finance—M. F. M.—September 16, 1931—1 p.*)

When cleaning catchbasins, the city is performing a governmental function for the purpose of the comfort and health of the general public, and thus the city is exempt from liability for the negligence of its employees engaged therein.

LIABILITY FOR INJURY IN RAZING DANGEROUS BUILDING

(No. 8263—*Chairman, Committee on Finance—E. L. M.—January 5, 1934—3 pp.*)

The city is not liable for any injury arising out of the razing of a building which is in a dangerous condition as the city is acting in its governmental capacity under the police power of the state in the interest of the public safety.

Citations:

Statute: Cah. '31, 24: 65(62).

Other reference: McQuillin, Mun. Corp., p. 784.

LIABILITY FOR DAMAGES BY DELAY IN DESTROYING DANGEROUS BUILDING

(No. 8011—*Chairman, Committee on Finance—Jud. G.—April 10, 1933—1½ pp.*)

The city is not liable for damage caused by a delay of the Commissioner of Buildings in tearing down a building, which was in a precarious and dangerous condition, as ordered by the City Council.

The claimant should look to the owner of the building for damages.

LIABILITY FOR DAMAGES WHEN ERECTING SAFETY ISLAND

(No. 8581—*Chairman, Committee on Finance—E. L. M.—December 6, 1934—2½ pp.*)

The city is not liable for damages caused to telephone conduits by city employees who were engaged in erecting a safety island, since reasonable care was exercised in the discharge of this work and no negligence was shown.

Citation:

Case: City of Joliet v. Seward, 86 Ill. 420 (1877).

LIABILITY FOR INJURIES BY SAFETY ZONE SIGN

(No. 8927—*Chairman, Finance Committee—S. A.—November 18, 1935—1 p.*)

In placing signs and markers for safety zones, the city is acting in a governmental capacity and is, therefore, not liable for injuries sustained when a safety zone sign fell down.

Citation:

Case: *Denver v. Forster*, 89 Colo. 246 (1931).

Opinion No. 7460 of February 24, 1932 to the Chairman of the Committee on Finance discusses the same point as the above opinion.

LIABILITY FOR DAMAGES BY NEGLIGENCE OF BOARD OF ELECTION EMPLOYEE

(No. 8270—*Chairman, Committee on Finance—E. L. M.—January 11, 1934—1½ pp.*)

The city is not liable for a window broken by an agent of the Board of Election Commissioners when posting an election notice. Members of the Board of Election Commissioners are municipal officers, and in the conduct of elections they are performing a governmental function and are not liable for the negligent acts of their employees.

Citation:

Statute: Cah. '33, 24: 274.

B. CORPORATE FUNCTIONS*(1) General Principles*

Notice of Suit: The legislature may validly require the giving of notice to the city as a condition precedent to the right to maintain a suit for personal injuries against the city. A failure to sign such notice when a signature is required by statute is not a compliance with the statute.—*Minnis v. Friend*, 360 Ill. 328 (1935).

LIABILITY FOR DAMAGES WHEN DUE CARE EXERCISED

(No. 8938—*Chairman, Committee on Finance—E. L. M.—November 21, 1935—2½ pp.*)

No liability rests on the city for damage to property where its employees were using due care and caution at the time of the accident.

Citation:

Case: *City of Joliet v. Seward*, 86 Ill. 402 (1877).

Opinion No. 8345 of March 29, 1934 to the Chairman of the Committee on Finance is in accord with the above opinion.

LIABILITY FOR DAMAGES IN CORPORATE FUNCTION

(No. 8967—*Chairman, Committee on Finance—E. L. M.—December 13, 1935—2½ pp.*)

The city is liable for damages for the acts of its employees when they are performing a corporate function, only in case of negligence or misconduct.

Opinions No. 8918 of November 8, 1935, and No. 8941 of November 21, 1935, both to the Chairman of the Committee on Finance are in accord with the above opinion.

LIABILITY FOR NEGLIGENCE

(No. 8724—*Chairman, Committee on Finance—E. L. M.—March 21, 1935—3 pp.*)

The city is not liable for damages where conclusive proof of negligence on the part of the city or its employees is not shown.

Citation:

Case: *City of Joliet v. Seward*, 86 Ill. 402, 405 (1877).

LIABILITY FOR EMPLOYEE'S NEGLIGENCE

(No. 6469—*Chairman, Finance Committee—C. W. K.—July 12, 1929—1½ pp.*)

The city is liable only for negligence on the part of its employees in the performance of their duties.

"PROXIMATE CAUSE" FOR LIABILITY

(No. 8338—*Chairman, Finance Committee—C. N.—March 21, 1934—1½ pp.*)

Where a claimant fails to set forth the negligence of the city or its employees as the proximate cause of the damage to his property, he has no legal claim against the city.

Opinion No. 8344 of March 27, 1934, to the Chairman of the Committee on Finance is in accord with the above opinion.

LIABILITY FOR DAMAGE OF INDEPENDENT CONTRACTOR

(No. 8981—*B. H.—December 20, 1935—1 p.*)

The City of Chicago is not liable for damage due to the negligence of an independent contractor who is under a contract with the city.

LIABILITY FOR CONSEQUENTIAL DAMAGES IN PUBLIC IMPROVEMENTS

(No. 7666—*Chairman, Committee on Finance—Jud. G.—July 27, 1932*
—3 pp.)

The city is not liable for consequential injuries, resulting from the construction of a public improvement, as the loss of business resulting from the installation of a sewer, in the absence of negligence or want of due care.

Citations:

Cases: Rigney v. Chicago, 102 Ill. 80 (1882).

Indianapolis v. Williams, 58 Ind. App. 44 (1914).

City of Olney v. Wharf, 115 Ill. 525 (1885-86).

Other reference: 5 McQuillin, Mun. Corp. (2nd ed.), sec. 2115.

REQUIREMENTS BEFORE RECOMMENDING PAYMENT OF CLAIM

(No. 8870—*Chairman, Committee on Finance—E. L. M.—September 16, 1935—2½ pp.*)

The Committee on Finance before recommending the payment of a claim should have conclusive proof of the manner in which the claim arose, proof of the negligence of the city or of its employees, and proof of reasonableness of the amount claimed, unless a judgment has been entered by a court against the city.

Citation:

Case: City of Joliet v. Seward, 86 Ill. 402 (1877).

LIABILITY FOR DAMAGE BY TRUCK IN CORPORATE FUNCTION

(No. 8246—*Chairman, Committee on Finance—E. Broz.—December 16, 1933—1½ pp.*)

The city is liable for damage caused to private property by a city truck, as the city's employee was negligent in operating the truck and was performing a corporate function.

LIABILITY FOR DAMAGE WHEN CARING FOR INJURED CITY EMPLOYEE

(No. 6902—*Chairman, Committee on Finance—F. J. V.—May 15, 1931*
—4½ pp.)

When a person's automobile is damaged while being used to carry an injured city employee to a hospital, the automobile should be re-

paired and the costs paid by the city as aid to injured employees is a proper corporate duty.

It is the duty of the city's employees to take immediate care of another city employee who is seriously injured while performing his duties and to use all reasonable means at their disposal for that purpose.

Citations:

Statute: SH '29, 24: 65.1.

Cases: Black v. Detroit, 78 N. W. 660 (1899).

City of Danville v. Danville Water Co., 178 Ill. 299 (1899).

Taylor v. Thompson, 42 Ill. 9 (1866-67).

Bruce v. Dickey, 116 Ill. 527 (1886).

Chicago v. Williams, 182 Ill. 135 (1899).

Dixon v. New York, 63 N.Y.S. 794 (1900).

Other references: Dillon, Mun. Corp. (4th ed.), sec. 445.
44 CJ 149, Note 34.

**LIABILITY FOR PROPERTY DAMAGE WHEN CLAIMANT
NEGLIGENT***

(No. 8977—*Chairman, Committee on Finance—E. L. M.—December 19, 1935—2 pp.*)

The city is not liable for damage caused to property of its employees or citizens by its property when the damage was due to negligence on the part of the party damaged and not to negligence by it.

**CONTRIBUTORY NEGLIGENCE OF CLAIMANT—RELEASE
WHEN CITY JOINTLY LIABLE***

(No. 7533—*City Attorney—C. J. A.—April 8, 1932—3 pp.*)

A person is guilty of contributory negligence in permitting a taxi driver to drive him down a street without objection and without warning him of the condition of the street when he has walked down that street earlier in the evening and noticed that it was full of holes.

When a person receives money from one who is jointly liable with the city for injury done to that person and the precise agreement made between the two at the time does not appear, the presumption would seem to be that the agreement constituted a release of liability, automatically releasing the city.

Citations:

Cases: Wallner v. Chicago Consolidated Traction Co., 245 Ill. 148 (1910).

Winslow v. Leland, 128 Ill. 304 (1889).

Parmalee v. Lawrence, 44 Ill. 405 (1867).

Rice v. Webster, 18 Ill. 331 (1856-57).

Benjamin v. McConnell, 9 Ill. 536 (1847).

McBride v. Scott, 132 Mich. 176, 93 N. W. 243 (1903).

(The original opinion of the foregoing synopsis is reproduced on the following pages.)

*See also Opinion No. 8968, p. 918, on contributory negligence.

OPINION OF FOREGOING SYNOPSIS

We have carefully examined the record in the above entitled cause. It is an action for injuries caused when a taxicab in which the plaintiff was riding struck a hole in the pavement on Hermitage avenue near Lawrence, which hole had been dug presumably by employees of the water department. The plaintiff struck her head against the top of the taxicab which knocked her unconscious and the testimony tended to show that there was some injury to her spine of a permanent nature which causes her continual headaches and that there was also injury to her leg which caused varicose veins to form. The jury returned a verdict for \$5,000, upon which the court entered judgment.

We believe that the city has fair grounds for reversal of the verdict for the following reasons: The plaintiff testified that she was acquainted with the condition of the street, that she and her lady friend had walked down that street earlier in the evening and had noticed that it was all full of holes dug some fifteen feet apart. We believe therefore that she was guilty of contributory negligence when she afterwards permitted the taxi driver to drive down that street without objection and without warning him of the condition of the street.

The record also shows that the plaintiff had received \$300 from the taxicab company in some sort of settlement of their liability. The attorney for the city asked the plaintiff on cross-examination what she said and what the representative of the taxicab company said when this money was paid but the court sustained an objection to that question. We believe that this was error since the defendant certainly had the right to show whether the payment of \$300 by a joint tortfeasor was intended as a settlement and release of such party.

While it is true that a plaintiff may give a covenant not to sue to one joint tortfeasor without releasing another tortfeasor, yet if he accepts money under such circumstances as will amount to a release of one joint tortfeasor, such release by operation of law releases all others jointly liable with the parties thus released.

Wallner v. Chicago Consolidated Traction Company, 245 Ill. 148.

Winslow v. Leland, 128 Ill. 304.

Parmalee v. Lawrence, 44 Ill. 405.

Rice v. Webster, 18 Ill. 331.

Benjamin v. McConnell, 4 Gilm. 536.

McBride v. Scott, 132 Mich. 176, 93 N. W. 243.

In this case the evidence merely shows that the plaintiff received \$300 from the taxicab company on account of her injuries. The precise agreement made between plaintiff and the taxicab company at the time does not appear, but under the ruling in the Wallner case, *supra*, the presumption would seem to be that such an arrangement constituted an accord and satisfaction and a release of liability which automatically released any other joint tortfeasors.

We believe therefore that an appeal from this judgment should be perfected.

* * * * *

ASSUMPTION OF RESPONSIBILITY FOR DAMAGE BY PARTY DAMAGED*

(No. 7750—*Committee on Finance—S. A. M.—September 21, 1932—3 pp.*)

The Commonwealth Edison Company, by a fair interpretation of the ordinances, assumes all responsibility for damage to its conduits by the city, when it lays its conduits so that the city cannot avoid damaging the conduits when it must repair a water main.

Citation:

Ordinance: Coun. J. (1897-98), p. 477 (Commonwealth Edison ord.).

LIABILITY FOR DAMAGE CAUSED BY MISTAKE OF CLAIMANT'S EMPLOYEE*

(No. 8808—*Chairman, Committee on Finance—R. D. K.—July 3, 1935—2½ pp.*)

The city is not liable for damage to a conduit of the Commonwealth Edison Company when an engineer of the company incorrectly designated the location of the conduit, and the city's plumbers performed their work on the basis of this information.

LIABILITY FOR DAMAGE ATTRIBUTED TO AN ACT OF GOD

(No. 6461—*Chairman, Committee on Finance—J. R.—June 28, 1929—1½ pp.*)

The city is not liable for damage caused to an automobile when a sudden gust of wind blew a tree over onto it, as the gust of wind was an act of God which human foresight could not anticipate and guard against.

Opinion No. 6516 of September 30, 1929 to the Chairman of the Committee on Finance is in accord with the above opinion.

*(2) Streets, Alleys and Sidewalks.***DUTY TO KEEP STREETS REASONABLY SAFE**

(No. 8652—*Chairman, Committee on Finance—E. L. M.—January 28, 1935—2½ pp.*)

While the city is bound to use reasonable care to keep its streets reasonably safe, it is not liable for damages when such care has been exercised.

*See also Opinion No. 8427, p. 925.

LIABILITY FOR DAMAGES DUE TO FAULTY STREET

(No. 7455—*Chairman, Committee on Finance—Jud. G.—February 19, 1932—1½ pp.*)

The city is liable for damages caused by its streets when three factors exist concurrently; evidence of the duty of the city to keep the street in reasonable repair, a failure to perform this duty, and an injury resulting therefrom.

Citations:

Cases: McClure v. Hoopeston Gas and Electric Co., 303 Ill. 89 (1922).
Smiley v. Barnes, 196 Ill. App. 530 (1916).
Milistan v. Chicago, 148 Ill. App. 540 (1910).

Street Railway On Street: The city is primarily liable for injuries sustained by reason of a defect in a street even though that part of the street was occupied by a street railway and judgment was entered against the city as the court is not concerned with any arrangement between the city and the Chicago Surface Lines with reference to the satisfaction of the judgment.—Voluch v. Rawson, 270 Ill. App. 583 (1933).

LIABILITY FOR DAMAGES BY PEDESTRIANS*

(No. 8799—*Chairman, Committee on Finance—R. D. K.—June 19, 1935—2 pp.*)

The city is not liable for damage caused to a store window by a pedestrian who kicked a paving stone through it.

The city is not an insurer of private property against damages committed by persons who may walk upon its streets, and may be held liable only for damages resulting from its negligence or the negligence of its employees.

Citation:

Other reference: Opinion No. 8642 (this volume, p. 924).

LIABILITY FOR DAMAGES FROM STREET DEFECT DUE TO UNUSUAL CAUSES

(No. 8966—*Chairman, Committee on Finance—E. M.—December 12, 1935—3½ pp.*)

Where the city exercised reasonable care and skill in restoring the street to a reasonably safe condition after making necessary repairs to a water main under the street, it cannot be charged with negligence and the city, therefore, is not liable for damages resulting from a depression in the street caused by severe and unexpected rainstorms after the repairs.

Citation:

Case: City of Joliet v. Seward, 86 Ill. 402 (1877).

*See also Opinion No. 8642, p. 924.

LIABILITY FOR DAMAGE DURING STREET REPAIRS*

(No. 8968—*Chairman, Committee on Finance—E. L. M.—December 16, 1935—5 pp.*)

As the City of Chicago exercised reasonable care in keeping the lower level of Michigan avenue in a safe condition for travel during the time necessary repairs were being made when it provided warning signals and barricades for the space undergoing repairs and the claimant was not exercising due care and caution for his own safety and the safety of his automobile while driving on the lower level of Michigan avenue, the city is not liable for any injury to his automobile.

**LIABILITY FOR NEGLIGENT MAINTENANCE OF STREETS—
“PROXIMATE CAUSE”**

(No. 8292—*Chairman, Committee on Finance—J. A. S.—February 1, 1934—1½ pp.*)

As the care and maintenance of streets is a corporate function in which the city acts ministerially, the city is liable for any negligence resulting therefrom, provided that such negligence is the proximate cause of the damage.

Citation:

Case: *Hanrahan v. Chicago*, 289 Ill. 400 (1920).

**LIABILITY FOR DAMAGES BY DEFECTIVE STREETS—NOTICE
OF DEFECT†**

(No. 8957—*Chairman, Committee on Finance—E. L. M.—December 9, 1935—3½ pp.*)

Municipalities are bound to use reasonable care to keep their streets in a reasonably safe condition and are liable for any injury to persons or property resulting from their failure to exercise such reasonable care.

However, municipalities are not insurers of the safe condition of their streets and are not liable for injuries that could not have been prevented by the exercise of reasonable care and vigilance.

Before liability can attach to the city for damages caused by a defective street, it must be shown that the city authorities had actual notice of the defective condition or such a set of circumstances must be shown that notice to the city would be implied; a defective con-

*See also Opinions No. 7533 and No. 8977, p. 914, and opinions, p. 921, on contributory negligence.

†See also Opinion No. 8818, p. 637, on liability for damage due to street defects caused by the street repairs of a public utility.

dition caused by heavy rains during the week preceding the accident would not constitute such implied notice.

Citations:

Cases: *City of Joliet v. Seward*, 86 Ill. 402 (1877).
Jones v. City of Greensboro, 124 N. C. 310 (1899).

OPINION OF FOREGOING SYNOPSIS

We have your letter together with council paper, correspondence and statement in the claim for damage to automobile in the sum of \$24.75. You request an opinion as to the liability of the city in the premises.

It is stated that on June 29, 1935, just after dusk, while driving on 82nd place, complainant's car ran against a manhole which was protruding above street level immediately west of an alley between Ellis avenue and the Illinois Central tracks; that 82nd place is a macadamized street and that there had been heavy rains for about a week prior which had washed away the ground to the east of the manhole to the extent that there was a hole ten to twelve inches deep and about one foot wide; that this hole was filled with water which concealed the hole from view; that he drove his car directly into this hole and against the manhole, badly damaging said car.

The Department of Streets and the ward office report that they had no complaints or notice of any kind prior to June 29, 1935 of the defective condition of 82nd place as described.

Municipalities are bound to use reasonable care to keep their streets in a reasonable safe condition and can be held to respond in damages for injury to persons or property resulting from their failure to exercise such reasonable care. Such failure constitutes negligence. However, it is equally well established that municipalities are not insurers of the safe condition of their streets and are not liable for injuries that could not have been prevented by the exercise of reasonable care and vigilance. In discussing this principle our Supreme Court says:

"* * * As we had occasion to say in another case, a municipal corporation is not liable to damages for every accident that may occur within its limits. It would be a most ruinous rule to adopt. Its officers are not required or expected to do everything that human energy or ingenuity can do to prevent injury to the citizen. When they have exercised reasonable care in this regard, they have discharged their whole duty to the public * * *"

City of Joliet v. Seward, 86 Ill. 402, at page 405.

The mere fact that an injury has been sustained because of some defect in a street does not of itself make the city liable. Before liability can attach to the city it must be shown that the city authorities had actual notice of the condition or such a state of circumstances must be shown that notice to the city would be implied. The law governing this feature of the liability of municipal corporations has been clearly stated by the Supreme Court of North Carolina in the following language:

"The corporation, however, is not liable without notice of the defect which caused the injury. This notice may be actual or implied. Implied notice may be from facts, from which it may be reasonably inferred, or from proof of circumstances from which it appears that the defect ought to have been known and remedied. Not only patent defects must be remedied, but reasonable care must be exercised to discover defects. For it has been well said that 'negligent ignorance is not less a breach of duty than willful neglect.' So, whether constructive notice will be attributed to the city must depend upon the circumstances of each case. Nothing more than reasonable care to discover the defects will be required of the corporation. Notice will be inferred from the notoriety of the defect, open to reasonable observation, but if

it be concealed or obscured in any way so as to escape the attentive observation on the part of the defendant, notice will not be attributed to it."

Jones v. Greensboro, 124 N. C. 310, at pages 312 and 313.

The city department of streets positively asserts that the city had no actual notice of the defect in 82nd place herein complained of. The complainant says that the defective condition of 82nd place was caused by the heavy rains during the week preceding the date of the accident. His statement would not constitute circumstances from which it would be implied that the city in the exercise of reasonable care ought to have known of and remedied the defective condition. To hold that such circumstances would imply notice to the city would impose an unreasonable burden upon a city the size of Chicago with its countless miles of highways.

It appears that in the claim under consideration here the city had no notice either actual or implied of a dangerous condition in 82nd place and consequently cannot be charged with negligence in the premises. We are of the opinion, therefore, that the City of Chicago is not liable for the injury to the automobile herein complained of.

* * * * *

Opinions No. 8530 of October 19, 1934 and No. 8986 of December 23, 1935 to the Chairman of the Committee on Finance are in accord with the above opinion.

Opinions No. 8726 of March 22, 1935, No. 8876 of September 19, 1935, and No. 8671 of February 13, 1935, all to the Chairman of the Committee on Finance are in accord with the above opinion.

NOTICE OF STREET DEFECT

(No. 8176—*E. J. B.*—September 14, 1933—1 p.)

The city is liable only for reasonable care in maintaining its highways. Upon notification of obstructions or defects, it is the city's duty to put the street in proper repair and a reasonable time is allowed for this work.

Notice to City of Defective Street: Where a street was out of repair and in a dangerous condition for such a length of time that the public authorities of the city, by the exercise of reasonable care, might have learned of the condition, then under such circumstances no actual notice of the defect need be shown to render the city liable for an injury caused by such a defect.—*Simon v. Chicago*, 279 Ill. App. 80 (1935).

WHAT CONSTITUTES NOTICE TO CITY

(No. 8953—*Chairman, Committee on Finance—E. L. M.*—December 4, 1935—2 pp.)

A municipality is bound to use reasonable care to keep its streets in a reasonably safe condition and is liable for injury to persons or property resulting from its failure to exercise such reasonable care.

When a street has been in a defective condition for five years, the city is charged with constructive notice of the defect and it is liable

for damages to an automobile caused by its failure to exercise care to keep the streets in a safe condition.

LIABILITY FOR DAMAGE OF DEFECTIVE STREETS WHEN CLAIMANT NEGLIGENT*

(No. 8989—*Chairman, Committee on Finance—E. L. M.—December 27, 1935—2½ pp.*)

When a person fails to exercise the degree of care and caution for his own safety that an ordinarily prudent man would exercise when traveling over a street he knew to be defective, the city is not liable for the damage caused by such defective street.

CONTRIBUTORY NEGLIGENCE IN INJURY FROM DEFECTIVE STREETS*

(No. 8935—*Chairman, Committee on Finance—E. L. M.—November 19, 1935—3½ pp.*)

While the city is subject to liability for negligence in the maintenance of its streets, a person cannot recover damages for an injury resulting therefrom, unless he be free from negligence in the matter himself and able to show that at the time of the injury, he was exercising due care and skill for his own safety.

Citations:

Cases: *Hanrahan v. Chicago*, 289 Ill. 400 (1920).
Chicago v. Seben, 165 Ill. 371 (1897).

LIABILITY FOR DAMAGES BY NEGLIGENT STREET MAINTENANCE

(No. 8944—*Chairman, Committee on Finance—E. L. M.—November 22, 1935—2½ pp.*)

Municipalities are bound to exercise reasonable care to keep the streets in repair and in a reasonably safe condition, and can be held to respond in damages for injury to persons or property resulting from a failure to exercise such reasonable care.

When the city had knowledge of the dangerous conditions of a street and made no effort to remedy this condition, it is liable for the property damage caused by an automobile striking a loose paving stone in the street and hurling the stone through a window.

Opinion No. 7365 of December 10, 1931 and No. 8828 of July 24, 1935, to the Chairman of the Committee on Finance are in accord with the above opinion.

*See also Opinion No. 8968, p. 918.

LIABILITY FOR DAMAGES FOR COLLAPSE OF STREET— NEGLECTANCE OF OTHER GOVERNMENTS

(No. 8924—*Chairman, Committee on Finance—J. W. M.—November 12, 1935—2 pp.*)

The city is not liable for the collapse of a street caused by the cave-in of a sewer, where the cave-in was the result of the negligence of contractors of the Sanitary District of Chicago and the Sanitary District had accepted an ordinance providing that it would hold that city harmless from any claims arising from any damage of this nature.

Citations:

Ordinances: Coun. J. (1927-28), pp. 1148, 1485.

Opinion No. 8946 of November 23, 1935 to the Chairman of the Committee on Finance is in accord with the above opinion.

LIABILITY FOR DAMAGE BY TRUCK OF BUREAU OF STREETS

(No. 7457—*Chairman, Committee on Finance—F. J. B.—February 23, 1932—3½ pp.*)

The care and maintenance of streets being a ministerial function, the city is liable for the negligence of its employees when they are so acting. It is, therefore, liable for damages caused by one of its trucks transporting coal for the Bureau of Streets.

Citations:

Cases: Chicago v. Seben, 165 Ill. 378 (1897).
Johnston v. Chicago, 258 Ill. 494 (1913).
City of Bloomington v. Brokaw, 77 Ill. 194 (1875).
Roumbos v. Chicago, 332 Ill. 70 (1929).

LIABILITY FOR DAMAGES BY DEFECTS IN BUREAU OF STREETS' TRUCK

(No. 7854—*Chairman, Committee on Finance—C. N.—December 24, 1932—2½ pp.*)

The city is liable for the property damage caused by the negligent acts of an employee driving a truck for the Bureau of Streets, but where the damage was caused by the defective brakes which it was the duty of the employee to keep in proper working order, this claim should be surcharged to the driver of the truck.

Citations:

Cases: Roth v. City of St. Joseph, 180 Mo. App. 381, 167 S. W. 1155 (1914).
Burlington and M. Railway v. Budin, 40 Pac. 503 (Colo., 1895).
Traveler's Insurance Co. v. Murray, 26 Pac. 774 (Colo., 1894).
Isbell v. New York, New Haven and Hartford Railway, 27 Conn. 393 (1858).

REPAIR OF STREETS AS MINISTERIAL DUTY

(No. 7071—Chairman, Committee on Finance—F. J. B.—August 13, 1931—3 pp.)

The city, in repairing streets, performs a ministerial duty and is liable for property damages resulting from the negligent performance of this duty.

The municipality is not responsible for the negligent performance of a public duty as compared with a ministerial or private duty.

Citations:

Ordinance: Hoover, Spec. Ord. (1915), p. 85.

Cases: Chicago v. Seben, 165 Ill. 371 (1897).

Johnston v. Chicago, 258 Ill. 494 (1913).

City of Bloomington v. Brokaw and Gregory, 77 Ill. 194 (1875).

Hanrahan v. Chicago, 289 Ill. 400 (1920).

Roumbos v. Chicago, 332 Ill. 70 (1929).

Opinions No. 7138 of September 21, 1931, No. 8925 of November 13, 1935, and No. 8660 of February 1, 1935, all to the Chairman of the Committee on Finance are in accord with the above opinion.

Street Repair: Where the city had notice that an independent contractor employed by a licensee used methods of breaking up street paving which caused vibrations dangerous to abutting property and failed to stop the use of such methods, it is liable for the cracking of walls so caused after notice was given.—Macer v. O'Brien, 356 Ill. 486 (1934).

LIABILITY FOR DAMAGE IN STREET REPAIRS BY CIVIL WORKS ADMINISTRATION

(No. 8328—Chairman, Committee on Finance—E. L. M.—March 13, 1934—2½ pp.)

The city is liable for negligence in a Civil Works Administration project when it is of a kind and nature that would bring it within the classification of a corporate function, such as the breaking up of city streets.

Citation:

Other reference: 6 McQuillin, Mun. Corp., sec. 2792.

OPINION OF FOREGOING SYNOPSIS

We have your letter with council paper and correspondence in re claim for broken electric sign. It appears from the report of our investigator, hereto attached, that a group of CWA workers were engaged in breaking up the pavement in South Loomis street and one of the workers so carelessly and negligently used his pick as to cast a piece of asphalt through the letters of the neon sign.

"A municipal government has a double function, first, the private, proprietary function and, second, the governmental function as the arm or agent of the state. The intermingling of these two functions has resulted in difficulty in determining the boundary line in separating the two. There is substantial unanimity, however, upon the proposition that

the city when exercising its private or corporate powers, is liable to respond in damages for the negligence of its officers, agents or employees * * *."—McQuillin on Municipal Corporations, section 2792, volume 6.

After careful consideration of the problem presented by the question of where liability attaches for injury arising out of the negligent performance of work done by CWA workers, the conclusion is forced upon us that the city is liable for such negligence when the project is of such kind and nature as to bring it within the classification of a corporate function where the negligence of its officers, agents or employees is properly imputed to a municipal corporation.

As we understand it the projects carried on through the agency of the CWA are of such kind and nature as the city has the power and the right to carry on at its own expense if it saw fit so to do. We are further informed that these projects are planned by the city for the benefit of the city and workers are furnished at the request of the city, so if the city chooses to have such work done at less cost or at no cost through the instrumentality of the CWA that organization becomes the agency through which the city performs a corporate function and the city would be liable to respond in damages for any injury arising out of the negligent performance thereof.

We are of the opinion, therefore, that the city is liable for the damage to the electric sign. * * *

* * * * *

LIABILITY IN NEGLIGENT OPERATION OF A STEAM ROLLER

(No. 8648—Chairman, Committee on Finance—E. L. M.—January 26, 1935—3½ pp.)

The city is liable for injuries to persons or property resulting from its negligence in the operation of a steam roller while repairing streets.

Citations:

- Cases: Hanrahan v. Chicago, 289 Ill. 400 (1920).
Chicago v. Seben, 165 Ill. 371 (1897).
Johnston v. Chicago, 258 Ill. 494 (1913).
City of Elgin v. Thompson, 98 Ill. App. 358 (1902).
McMulkin v. Chicago, 92 Ill. App. 33 (1901).

Opinion No. 8425 of June 8, 1934 to the Chairman of the Committee on Finance is in accord with the above opinion.

LIABILITY IN STREET REPAIR—DAMAGE BY PEDESTRIAN*

(No. 8642—Chairman, Committee on Finance—E. L. M.—January 24, 1935—2 pp.)

The city is bound to use reasonable care in the exercise of a corporate activity and is liable only when injury results from negligence in this activity. The fact that a pile of stones was placed on a sidewalk in making street repairs and a passing pedestrian kicked one of the stones, cracking the window of the adjacent premises, does not constitute negligence.

*See also Opinion No. 8799, p. 917.

LIABILITY FOR DAMAGES TO PUBLIC UTILITY CONDUITS*

(No. 8427—*Chairman, Committee on Finance—E. L. M.—June 8, 1934—3 pp.*)

When the city acts in its ministerial capacity, it is liable for damages arising from the negligence of its employees.

Where the Bureau of Streets had knowledge of the location of a public utility conduit and cables but failed to instruct its employees who were digging in that locality, of the proximity of the cables and to guard against needless injury thereto, it is guilty of negligence and the city is liable for any damages incurred thereby.

Citations:

- Cases: Johnston v. Chicago, 258 Ill. 494 (1913).
Hanrahan v. Chicago, 289 Ill. 400 (1920).
Chicago v. Seben, 165 Ill. 371 (1897).

Opinion No. 8485 of August 6, 1934 to the Chairman of the Committee on Finance is in accord with the above opinion.

LIABILITY FOR DAMAGES IN STREET CLEANING

(No. 7414—*Chairman, Committee on Finance—S. A. M.—January 12, 1932—2½ pp.*)

The city is not liable for the negligence of its employees when performing a governmental function, but it is liable for their negligence when performing a corporate function; street cleaning is a corporate function.

Citations:

- Cases: Harris v. District of Columbia, 14 A. L. R. 1471 (1921).
Roumbos v. Chicago, 332 Ill. 70 (1929).

LIABILITY FOR DAMAGES BY NEGLIGENT STREET LIGHTING

(No. 8937—*Chairman, Committee on Finance—E. L. M.—November 21, 1935—2 pp.*)

The city is liable for the negligence of its employees when they are engaging in a corporate function, in this instance, that of caring for a street lamp.

The failure of the city to exercise reasonable care and skill in carrying on its corporate activities, constitutes negligence.

*See also Opinions No. 7750 and 8808, p. 916.

LIABILITY FOR DAMAGES BY DEFECTIVE ELECTRIC WIRING ON STREETS

(No. 8584—*Chairman, Committee on Finance—J. J. S. and S. A.—December 10, 1934—10 pp.*)

The city has the duty to keep streets in a reasonably safe condition and is liable for damages resulting from defective light wires along its streets.

The prevailing tendency seems to be to permit the jury to be the final judge of damages where the injuries are serious.

Citations:

- Cases: Village of Palestine v. Silver, 225 Ill. 630 (1907).
Stedwell v. Chicago, 297 Ill. 486 (1921).
Kavale v. Morton Salt Co., 242 Ill. App. 205 (1926).
Benson v. Chicago, Rock Island and Pacific Ry., 267 Ill. App. 11 (1932).
Lamar v. Collins, 252 Ill. App. 238 (1929).
Bryant v. Illinois Central R. R., 252 Ill. App. 428 (1929).
Wilson v. Baltimore and Ohio R. R., 194 Ill. App. 491 (1916).
Princell v. Pickwick Greyhound Lines, 262 Ill. App. 298 (1931).
Other reference: 4 Sedgwick, Damages, sec. 1334.

LIABILITY FOR INJURY FROM DAMAGED SIDEWALKS— RESTORATION OF DAMAGED SIDEWALKS

(No. 8476—*Deputy Commissioner of Buildings—E. L. M.—July 18, 1934—2½ pp.*)

Sidewalks are the property of the city and the city is liable for any injuries caused by the damaged condition of the sidewalk.

The bond now required of wreckers when procuring permits to tear down buildings in the city covers the cost of replacing sidewalks damaged in the wrecking operation and the wrecker or his surety can be made to restore the sidewalk or reimburse the city for the cost of such restoration.

Citations:

- Cases: Chicago Cold Storage Co. v. People, 224 Ill. 287 (1906-07).
Chicago v. Crosley, 111 Ill. 538 (1884-85).

LIABILITY FOR NEGLIGENCE IN SIDEWALK MAINTENANCE

(No. 8916—*Chairman, Committee on Finance—E. L. M.—November 8, 1935—2 pp.*)

The failure of the city to keep its streets in a reasonably safe condition constitutes negligence. The fact that a sidewalk has remained

in a defective condition for five years is sufficient to charge the city with constructive notice of the defect.

The city is liable for damages or injury due to negligence in maintaining streets.

LIABILITY FOR DAMAGES TO TRAP DOORS IN STREETS

(No. 8387—*Chairman, Committee on Finance—E. L. M.—May 14, 1934—2½ pp.*)

The public streets and sidewalks of the city are dedicated to the public for public use and no individuals can acquire a right therein which would entitle him to recover damages for any injury thereto.

The city is not liable for damages to trap doors of a vault beneath the sidewalk where such doors and vault exist without authority of the city.

LIABILITY FOR INJURY FROM ICY SIDEWALKS

(No. 8621—*A. M. S.—January 10, 1935—1 p.*)

A person cannot recover for injuries sustained by his falling on an icy sidewalk or street, as the city cannot control the elements or keep sidewalks and streets absolutely clean in winter months.

Sidewalk Snow and Ice: The city is not liable for personal injuries sustained by falling on a sidewalk covered with snow and ice when such ice was caused by natural forces and not in an artificial way.—*Haymes v. Chicago*, 279 Ill. App. 481 (1935).

Ice on Sidewalks Caused by City: The city is liable for injuries sustained from the slipperiness of a sidewalk which was caused by overflowing of a school playground and consequent freezing of water on the sidewalk when such dangerous condition existed for thirteen days prior to the accident and the city neglected to remove the ice. Here the ice was caused by artificial means and the city failed to remove it.—*Graham v. Chicago*, 346 Ill. 638 (1931).

LIABILITY FOR INJURIES BY OBSTRUCTIONS ON STREETS

(No. 8763—*Commissioner of Public Works—Q. O'B.—May 7, 1935—2½ pp.*)

The city is required to keep buffalo boxes and other similar structures erected on sidewalks and parkways reasonably safe, and can be

held liable for injuries sustained because of their being in a defective or unsafe condition.

Citations:

Cases: *Brennan v. City of Streator*, 256 Ill. 466 (1912-13).
Caruso v. Chicago, 278 Ill. App. 247 (1934-35).

Projections on Parkway: The city must exercise care that a water valve-box maintained by it in a parkway between the curb and a sidewalk is not such an obstruction as may cause injury to a pedestrian crossing the parkway in the exercise of due care and it is liable for injuries sustained when such care has not been exercised.—*Caruso v. Chicago*, 278 Ill. App. 247 (1934).

LIABILITY FOR DAMAGES FROM SIGN IN ALLEY

(No. 8783—*Commissioner of Public Works*—*W. L. S.*—*May 28, 1935*—*1½ pp.*)

An advertising sign erected on a post in a public alley should be ordered removed by the Commissioner of Public Works. The city could be held liable for injuries resulting from the sign so located.

*(3) Water Supply**

LIABILITY FOR DAMAGES IN WATER SUPPLY FUNCTIONS

(No. 8162—*Chairman, Committee on Finance*—*E. L. M.*—*August 31, 1933*—*2½ pp.*)

The operation of waterworks and the supplying of water by the city for profit is a private undertaking and it is subject to the same duties and liabilities as a private corporation or individual engaged in such business. Thus, the city is required to exercise due care and skill in constructing and maintaining the waterworks system and it is liable for damages only when they are caused by the negligence or unskillfulness of city employees.

Citation:

Case: *Chicago v. Selz, Schwab and Co.*, 202 Ill. 545 (1903).

Opinion No. 7405 of January 7, 1932 to the Committee on Finance and opinion No. 8636 of January 21, 1935 to the Commissioner of Public Works are in accord with the above opinion.

LIABILITY FOR DAMAGES BY NEGLIGENT WATER SYSTEM CONSTRUCTION OR MAINTENANCE

(No. 8327—*Chairman, Committee on Finance*—*J. J. S.*—*March 12, 1934*—*3½ pp.*)

The city in adopting a plan acts judicially and is not liable for the defects of the plan, unless the plan is unreasonable, but the city acts

*See Opinion No. 8326, on the failure of the city to supply water to extinguish a fire.

ministerially in the execution of a plan and becomes liable for the negligence of its agents or employees.

The city is liable in damages when it is negligent in the construction or maintenance of its water system and property is injured.

Citations:

- Cases:** Seben v. Chicago, 165 Ill. 371 (1897).
Johnson v. Chicago, 256 Ill. 495 (1912-13).
Chicago v. Selz, Schwab and Co., 202 Ill. 545 (1903).
Hanrahan v. Chicago, 289 Ill. 400 (1920).
Healy v. Chicago, 131 Ill. App. 183 (1908).
Norton v. Chicago, 116 Ill. App. 571 (1905).
Other reference: Dillon, Mun. Corp. (5th ed.), secs. 1731-47.

EXTENT OF LIABILITY IN WATER SERVICES

(No. 8289—*Chairman, Committee on Finance—E. L. M.—January 31, 1934—2 pp.*)

While the furnishing of water by the city is a corporate function, the city is not an insurer of the purity of the water or of the safe condition of property, and is not liable for injuries that could not have been prevented by the exercise of due care and vigilance.

Opinion No. 8369 of April 18, 1934 to the Chairman of the Committee on Finance is in accord with the above opinion.

LIABILITY FOR DAMAGES BY WATER PIPE EXTENSION WORK

(No. 8423—*Chairman, Committee on Finance—E. L. M.—June 6, 1934—2½ pp.*)

In operating its water system, the city acts in a private corporate capacity and is bound to exercise due care and skill.

Where a workman of the water-pipe extension bureau disregarded a warning as to the proximity of a sign and damaged the sign, the workman was negligent and the city is liable for such damage.

Citation:

- Case:** Simon v. New York; 143 N. Y. S. 1097 (1913).

LIABILITY FOR NEGLIGENCE IN LAYING WATER PIPE EXTENSIONS

(No. 8321—*Chairman, Committee on Finance—E. L. M.—March 9, 1934—1½ pp.*)

The city is liable for damages by the carelessness of water pipe extension employees, since the city acts in its corporate capacity when doing this type of work.

Opinion No. 8527 of October 18, 1934 to the Chairman of the Committee on Finance is in accord with the above opinion.

LIABILITY FOR DAMAGE IN BLASTING FOR WATER TUNNEL

(No. 8382—*Chairman, Committee on Finance—E. L. M.—May 9, 1934*
—2½ pp.)

In the maintenance of a water system, the city acts in a corporate capacity and is bound to use due care and skill.

The city is not liable for damages caused by blasting in connection with water tunnel where the due care and skill were exercised.

Citation:

Case: *Simon v. New York*, 143 N. Y. S. 1097 (1913).

**LIABILITY FOR DAMAGE TO ABUTTING PROPERTY IN
INSTALLING WATER MAINS**

(No. 7185—*Commissioner of Public Works—F. J. B.—October 13, 1931*—4½ pp.)

The city is not liable, in the absence of any negligence on its part, to the abutting property owners for the damage done to their sub-sidewalk structures when such damage was necessary for the proper installation of a water main.

Citations:

Statute: Ill. Laws (1858), p. 203, sec. 20.

Cases: *Chicago, Rock Island and Pacific Railroad v. City of Joliet*, 79 Ill. 25 (1875).

Birge v. City of Centralia, 218 Ill. 503 (1905).

Wilder v. Aurora, DeKalb and Rockford Electric Co., 216 Ill. 493 (1905).

Tacoma Safety Deposit Co. v. Chicago, 247 Ill. 192 (1910-11).

People v. Marshall Field and Co., 266 Ill. 609 (1915).

Barrows v. City of Sycamore, 150 Ill. 588 (1894).

Hill v. Kimball, 269 Ill. 398 (1915).

Other references: *Op. Corp. Counsel* (1924-25), p. 667.

McQuillin, Mun. Corp. (2nd ed.), sec. 2115.

**LIABILITY FOR NEGLIGENT OPERATION OF WATER BUREAU
EQUIPMENT**

(No. 8080—*Chairman, Committee on Finance—Jud. G.—May 29, 1933*
—1½ pp.)

The city, in its corporate capacity as a water company, is liable for damages caused by the careless operation of a crane by an employee of the Department of Water when removing rock from the mouth of the shaft of the Chicago avenue water tunnel.

**LIABILITY FOR NEGLIGENT OPERATION OF EQUIPMENT IN
INSTALLING WATER PIPE**

(No. 8249—*Chairman, Committee on Finance—J. A. S.—December 20, 1933—1½ pp.*)

The city is liable for damages caused to private property by the negligence of its employees when operating machinery used in the installation of a water pipe, as the installation of a water pipe is a corporate function.

Citation:

Case: *Chicago v. Selz, Schwab and Co.*, 202 Ill. 540 (1903).

LIABILITY FOR NEGLIGENT EXCAVATION FOR WATER MAIN

(No. 8987—*Chairman, Committee on Finance—E. L. M.—December 23, 1935—2 pp.*)

When the city employees did not exercise reasonable care and skill in operating the crane used in excavating for the installation of a new water main, the city is liable for the damages sustained thereby.

Opinion No. 8322 of March 9, 1934, to the Chairman of the Committee on Finance is in accord with the above opinion.

**LIABILITY FOR DAMAGES TO PUBLIC UTILITY IN
INSTALLING A WATER MAIN***

(No. 7588—*Chairman, Committee on Finance—Jud. G.—May 31, 1932—3 pp.*)

Although the city's right to use streets is paramount, the water pipe extension department is bound to use reasonable care when installing a water-main. The city is not liable for the damage to a conduit of Commonwealth Edison Company when that care has been exercised.

**LIABILITY FOR DAMAGES TO PUBLIC UTILITY PROPERTY IN
WATER PIPE EXTENSION WORK***

(No. 8529—*Chairman, Committee on Finance—E. L. M.—October 19, 1934—3 pp.*)

Where the Commonwealth Edison Company conduits interfere with the extension of water pipes by the city with the knowledge of the company, the city is not liable for damages for cutting the conduit to extend the water pipes.

*See also Opinion No. 8427, p. 925.

LIABILITY FOR DAMAGE TO ELECTRIC CONDUITS BY WATER MAIN REPAIR*

(No. 8951—*E. L. M.*—December 2, 1935—2 pp.)

Where the Commonwealth Edison Company laid its conduits after the city's water mains were installed, and the conduits were located without regard to their interference with the city's right to the unobstructed access to its water mains, when repairs became necessary, the city is not liable for damages to the conduit caused by such necessary repairs.

Opinions No. 7557 of April 25, 1932, No. 8016 of April 13, 1933, and No. 7820 of November 28, 1932 all to the Chairman of the Committee on Finance, are in accord with the above opinion.

LIABILITY FOR LEAKAGE OF A WATER SUPPLY PIPE

(No. 6399—*Chairman, Committee on Finance—J. R.*—April 4, 1929—1 p.)

The city is not liable for damage caused by the leakage of a water supply pipe on a property owner's side of the service.

LIABILITY FOR DAMAGE DUE TO BURSTING WATER MAIN

(No. 7606—*Chairman, Committee on Finance—Jud. G.*—June 14, 1932—5 pp.)

The city is not liable for damage caused by the breaking of a water main unless defective material was used in its construction, or there was negligence in its installation and maintenance, or there was negligence after notice had been received of the break.

Citations:

Cases: *Terry v. City of New York*, 21 N. Y. Super. 504 (1861).
Chicago v. Selz, Schwab and Co., 202 Ill. 549 (1903).

Other reference: 8 McQuillin, *Mun. Corp.*, p. 8287.

OPINION OF FOREGOING SYNOPSIS

We have your communication of May 14 with correspondence and statement in the claim for damage caused by water from a break in the water main, and requesting an opinion as to the liability of the City of Chicago for damages.

As this is the second claim growing out of that break in the water main, we requested our investigator to make a further investigation of the facts with the result that we have a large amount of detailed information but nothing which warrants a different conclusion than that contained in our opinion No. 756 dated April 29, 1932.

It appears that on Friday, February 12, at about 6:30 p. m., a break occurred in the thirty-six inch water main on 22nd street fifty-four feet west

*See opinions on the preceding page and Opinion No. 8427, p. 925.

of Loomis street. This was reported to the City Hall office and relayed to the district office at 23rd street and Ashland avenue. At that time the emergency crew of four men were engaged on duty at another point but they reached the place of the break at 7:15 p.m. To shut off the water required the closing of a number of valves in smaller mains connected with the bursted main, as well as the valve in two big thirty-six inch mains, one of which was located at Racine avenue and 22nd street. A call was sent to the homes of employees of the water department summoning them to help. To close the big valves on the thirty-six inch mains required the combined efforts of twelve or fifteen men. More than forty men assisted in the work and the water was shut off at about 10 o'clock p.m.

It is the law in this state that the city cannot be held liable for damages caused by the breaking of water mains unless defective material is used in the construction of the water main, or negligence in the installation and maintenance of the same, or negligence after notice of the break in the water main.

This water main was installed in 1876 and has been intact since that time showing that the material used in the construction was not defective and that there was no negligence in its installation and maintenance. The remaining question is: Was the city negligent after receiving notice of the break in the main? We believe that the above fact briefly stated shows due diligence on the part of the city employees after notice of the break was received.

No liability attaches to the city because of the mere fact of the main's bursting. In support of this conclusion we quote from *Terry v. The Mayor & C. of New York*, 8 Bosworth (21 New York Superior Court Reports) at page 510:

"But there is not in reality evidence enough in the case to charge anyone with the wrong. The use of the Croton water by pipes was legal. No one is responsible for injury committed by their breaking, unless caused by negligence or design. If all due diligence is used in making or maintaining the pipes, the injury becomes an unavoidable accident, for which no one is responsible. There was no evidence in this case that the pipes were originally defective. On the contrary, as they were in long before the damage in this particular case, they must have been originally strong. * * * Mere results are not proof of want of care. * * *"

Our own Supreme Court, in the case of *City of Chicago v. Selz Schwab & Co.*, 202 Ill. at page 549, quoting the allegations upon which recovery was sought, said:

"The third count avers that it was the duty of the defendant to construct, use, control, maintain and operate its water system, and conduits, mains, pipes and appliances laid under the streets, in a proper and skillful manner, and to maintain a system of inspection, and make such inspection, from time to time, as would assure reasonable promptness in the detection of imperfections, so that it could take proper means in guarding against damage; that the same were negligently, defectively and improperly constructed, used, kept, operated and maintained and that defendant did not maintain a system of inspection; that there existed a deterioration and damage to the material of the pipes, mains and conduits, and that solely by reason of such imperfection, defect and deterioration, which the defendant neglected to detect, the break occurred, causing the damage. There were no facts stated from which the law would imply a duty of inspecting the pipes laid deep in the earth below the streets, or any facts showing for what reason an inspection would or could be necessary. Judging from the facts stated in the count, an inspection of mains and pipes under the streets would be impossible, and if there were any facts showing the necessity or pro-

priety of such inspection they should have been alleged. This count did not state a cause of action."

Any liability of the city in this case depends on the answer to the question: Was there any negligence on the part of the water department after the break in the water main was reported? McQuillin on Municipal Corporations, volume VIII, page 8287, states:

"In all sewer or water main cases cited by the plaintiff in which the city was held liable there was either evidence of actual negligence in the construction or operation of the water main or sewer, or notice to the city authorities of the break or overflow, accompanied by neglect on their part to repair promptly, or actual notice by reason of like prior occurrences that the sewer or pipe were defectively constructed or maintained. * * * A municipality is not an insurer of its water or sewer system any more than of its streets. It is required only to use reasonable care in establishing and maintaining such a system."

The above citations are but a few of many consulted and all agree with the principle expressed in the authorities cited above.

The facts in this case show unusual promptness on the part of the water department after receiving notice of the break. All employees except four members of the emergency squad had gone home for the day. The men were on the ground and at work within three-quarters of an hour after the break occurred and within a much shorter time after the notice reached them.

The fact that the valves on the lateral mains located in streets intersecting 22nd street had to be closed, in addition to the large 36 inch valve at 22nd street and Racine avenue, required many men. A dozen more men were required to close the 36 inch valve. These facts show a large amount of work necessary to be done over a considerable territory.

The flow of water from the broken main was stopped within three hours after notice to the emergency squad of the district in which the break occurred. There was no negligence after the main burst.

From the above facts we are of the opinion that the city is not liable for the damage suffered. * * *

Opinions No. 7558 of April 29, 1932, No. 8278 of January 20, 1934, No. 8335 of March 19, 1934, No. 8377 of May 2, 1934, No. 8386 of May 12, 1934, No. 8388 of May 14, 1934, and No. 8980 of December 20, 1935, all to the Chairman of the Committee on Finance, are in accord with the above opinion.

LIABILITY FOR DAMAGE BY A BROKEN WATER MAIN

(No. 6401—Chairman, Committee on Finance—J. R.—April 8, 1929—2½ pp.)

The city is not liable for damage to property caused by a broken water main when due diligence has been exercised by its employees, first, in laying the main, and second, in promptly shutting off the water and repairing the main when notified of the break.

Citation:

Other reference: 8 McQuillin, Mun. Corp., p. 8287.

Opinions No. 6446 of June 5, 1929, No. 6444 of June 4, 1929, No. 6440 of May 31, 1929, No. 6424 of May 2, 1929, No. 6414 of April 18, 1929, No. 6413 of April 18, 1929, No. 6412 of April 18, 1929, No. 6411 of April 18, 1929, No. 6409 of April 17, 1929, No. 6403 of April 9, 1929, No. 6404 of April 9, 1929, No. 6405 of April 9, 1929, all to the Chairman of the Committee on Finance are in accord with the above opinion.

LIABILITY FOR DAMAGE BY A BROKEN WATER MAIN

(No. 6406—*Chairman, Committee on Finance—J. R.—April 17, 1929—2 pp.*)

The city is not liable for damage caused to property by a water main broken by the crane of a contracting company while excavating for street paving, since the city's employees exercised due diligence in shutting off the water and repairing the main.

LIABILITY FOR DAMAGES BY WATER MAIN BREAK

(No. 8978—*Committee on Finance—E. L. M.—December 19, 1935—2½ pp.*)

When the city exercised the full measure of promptness and diligence required of it in shutting down the flow of water into a broken main when it was notified of the break and the break in the main was caused by the failure of the agent of the Sanitary District of Chicago to exercise reasonable care and skill in the construction of its sewer, the city is not liable for the cost of replacing a sidewalk undermined by such break.

Citation:

Ordinance: Coun. J. (1932-33), p. 2821.

LIABILITY FOR NEGLIGENT REPAIR OF WATER PIPES

(No. 7400—*Chairman, Committee on Finance—E. Broz.—December 28, 1931—2 pp.*)

The city is not an insurer of its equipment nor of the maintenance of its water pipes, but it is liable for negligence or delinquency in repairing.

LIABILITY FOR FAILURE TO REPLACE DEFECTIVE MAINS

(No. 8286—*Chairman, Committee on Finance—E. L. M.—January 26, 1934—3 pp.*)

The city is liable for damages due to a leak in a water main since it did not exercise due care, in that it failed to replace the defective main, though aware of its decomposed condition for some time, and failed to repair the leaks in the main immediately upon notification of the condition.

Citations:

Cases: Johnston v. Chicago, 258 Ill. 494 (1913).
Chicago v. Selz, Schwab and Co., 202 Ill. 545 (1903).

DELAY IN REPAIRING LEAK

(No. 6462—Chairman, Committee on Finance—J. R.—June 28, 1929—1½ pp.)

When an unreasonable length of time has elapsed between the time of the complaint of a water leak and the time of shutting off the water and repairing the leak the city's employees did not exercise due diligence and the city is liable for damage caused by the leak.

Opinions No. 7372 of December 11, 1931, No. 7464 of February 26, 1932, No. 8598 of December 24, 1934, and No. 7816 of November 25, 1932, all to the Chairman of the Committee on Finance are in accord with the above opinion.

DELAY IN REPAIRING WATER MAIN BREAK

(No. 7718—Chairman, Committee on Finance—Jud. G.—August 16, 1932—4½ pp.)

The city is liable for damages caused by breaks in its water mains where there were faulty designs or defective materials used in their construction or where there was negligence on the part of the city to repair, after notice of a break.

The city, as a water company, is accountable to the same degree for negligence as a private corporation.

Failure of an employee of the Department of Water to do anything for eight hours after being notified of a break in the water main constitutes negligence on his part and this negligence is imputed to the city as a water company. The city is therefore liable for any damage caused by this negligent delay.

Citations:

Cases: Wagner v. City of Rock Island, 146 Ill. 154 (1892-93).

Cincinnati v. Jacob, 10 Ohio Dec. 27 (1887).

Other references: 8 McQuillin, Mun. Corp. 8287.

Farnham, Waters, sec. 158b.

Bouvier's Law Dictionary, p. 2312, "negligence."

**LIABILITY FOR DAMAGE IN INSTALLATION OF
WATER METER**

(No. 7849—Chairman, Committee on Finance—C. N.—December 22, 1932—2½ pp.)

The city is not liable for any property damage resulting from the installation of a water meter and is liable only for negligence or willful misconduct.

Citation:

Case: Baltimore v. Schnitker, 84 Md. 34, 44, 34 Atl. 1132 (1896).

LIABILITY FOR DAMAGE IN INSTALLATION OF WATER METER

(No. 8337—*Chairman, Committee on Finance—E. L. M.—March 21, 1934—2½ pp.*)

In a case involving the installation of a water meter, no claim for damage should be paid until conclusive proof is furnished, both as to the negligence of the city or its employees and of the reasonableness of the amount claimed.

LIABILITY FOR DAMAGES BY DEFECTIVE WATER METER

(No. 7815—*Chairman of Finance Committee—Jud. G.—November 25, 1932—2 pp.*)

Where a defective water meter is installed and maintained as the property of the city by the water division, the city is liable for the damage that is caused to the premises by its bursting.

Citation:

Ordinance: Code '31: 4110.

LIABILITY FOR DAMAGE CAUSED BY A DEFECTIVE FIRE HYDRANT

(No. 8813—*Chairman, Committee on Finance—J. A. S.—July 15, 1935—3½ pp.*)

Ordinarily, the city is liable for damages caused by a defective fire hydrant, for fire hydrants are a part of the water system, and in maintaining a water system the city performs a corporate function and is liable for any injuries arising from negligence by it or its employees in the performance of that function.

Citation:

Case: *Chicago v. Selz, Schwab and Company*, 202 Ill. 545 (1903).

LIABILITY FOR DAMAGE BY BROKEN FIRE HYDRANT

(No. 8847—*Chairman, Committee on Finance—M. D. S.—August 14, 1935—1½ pp.*)

The city is not liable for any damage to property caused by the breaking of a fire hydrant by an automobile when the city promptly repaired the hydrant.

LIABILITY FOR DAMAGES IN BREAKING OF HYDRANT

(No. 8718—*Chairman, Committee on Finance—E. L. M.—March 15, 1935—4 pp.*)

The city is not liable for damage caused by a break in a hydrant lead when the city had no previous knowledge that such break was impending, and when the city exercised due promptness and diligence in locating the break and in shutting off the water.

Citations:

Cases: *Simon v. New York*, 143 N. Y. S. 1097 (1913).
Jenney v. City of Brooklyn, 24 N. E. 274 (N. Y., 1890).
Chicago v. Selz, Schwab and Co., 208 Ill. 545 (1904).

LIABILITY FOR NEGLIGENT REPAIR OF WATER HYDRANT

(No. 8943—*Chairman, Committee on Finance—E. L. M.—November 22, 1935—1½ pp.*)

The city is liable for the negligence of its employees when they are performing a corporate function, in this case, that of repairing a water hydrant.

Opinion No. 8379 of May 4, 1934 to the Chairman of the Committee on Finance is in accord with the above opinion.

LIABILITY FOR DAMAGE IN REPAIR OF FIRE HYDRANTS

(No. 8730—*Chairman, Committee on Finance—C. N.—March 26, 1935—3 pp.*)

The city is liable for damage to conduit and cable equipment of Commonwealth Edison Company caused by the city's water pipe extension workmen who were negligent while engaged in repairing or replacing fire hydrants and repairing leaks at various locations. These employees were performing a corporate function as they were doing their accustomed work of repairing the water mains and hydrants of the city without any regard to any immediate use for the extinguishment of fire.

Citations:

Case: *Chicago v. Selz, Schwab and Co.*, 202 Ill. 550 (1903).
Other reference: 6 McQuillin, *Mun. Corp.* (2nd ed.), sec. 2852, p. 899.

(4) *Other Corporate Functions*

LIABILITY FOR NEGLIGENT BLASTING FOR PUBLIC IMPROVEMENT

(No. 7795—*Chairman, Committee on Finance—C. N.—November 1, 1932—4½ pp.*)

The city is liable for damage to property caused by blasting for a public improvement if the blasting is done negligently or carelessly by its employees.

Citations:

Cases: Seamon v. Chicago, 25 Ill. 361 (1860-61).

Kugel v. City of Sterling, 164 Ill. App. 377 (1912).

Joliet v. Donnelly, 129 Ill. App. 122 (1907).

Other reference: 5 McQuillin, Mun. Corp. (2nd ed.), secs. 2115, 2128.

LIABILITY FOR NEGLIGENT OPERATION OF BRIDGES

(No. 8256—*Chairman, Committee on Finance—E. L. M.—December 29, 1933—6½ pp.*)

The city acts in its corporate capacity when it maintains and operates a bridge over a navigable stream, and it is liable for any injury caused by the negligence of its employees.

Citations:

Case: Chicago v. O'Malley, 196 Ill. 197 (1902).

Other reference: 6 McQuillin, Mun. Corp., sec. 2841.

LIABILITY FOR DAMAGE BY COLLISION THROUGH BRIDGE

(No. 6400—*Chairman, Committee on Finance—J. R.—April 8, 1929—2 pp.*)

The city is not liable for damage to a steamer which passed through the north draw of a bridge and collided with a scow, when it had been notified to go through the south draw.

LIABILITY FOR FAILURE TO OPEN BRIDGES

(No. 8593—*Chairman, Committee on Finance—E. L. M.—December 17, 1934—2½ pp.*)

The city is liable for damages resulting from negligence in the operation of its bridges. The failure of a bridge tender to be in a position to open the bridge when signaled, constitutes such negligence.

Citations:

Case: Lehigh Valley Transportation Co. v. Chicago, 237 Ill. 581 (1908-09).

Other reference: 6 McQuillin, Mun. Corp., sec. 2841.

LIABILITY FOR NEGLIGENT BRIDGE EXCAVATION

(No. 8225—Chairman, Committee on Finance—E. L. M.—November 23, 1933—2½ pp.)

The city is liable for the damage caused to the cable of the Western Union Telegraph Company by the negligence of its employees who were excavating a caisson for the approach to a bridge, for in the performance of that work the city was performing a corporate function.

Citations:

- Cases: Chicago v. Seben, 165 Ill. 371 (1897).
Johnston v. Chicago, 258 Ill. 494 (1913).
Hanrahan v. Chicago, 289 Ill. 405 (1920).

LIABILITY FOR DAMAGE BY SEWER SYSTEM DEFECTS

(No. 8833—Chairman, Committee on Finance—J. A. S.—July 27, 1935—3 pp.)

The city is liable for damage caused by a defect in a sewer system that it has constructed or adopted, when it has failed to use reasonable diligence in repairing and maintaining the system.

Citations:

- Cases: Chicago v. Seben, 185 Ill. 371 (1900).
Republic Co. v. City of Rockford, 251 Ill. App. 109 (1928-29).

LIABILITY FOR EXPLOSION OF SEWER MANHOLE

(No. 8979—Chairman, Committee on Finance—E. L. M.—December 19, 1935—2 pp.)

The city is bound to exercise due care and skill in constructing and maintaining its sewers but it is not an insurer of the safe condition of said property and thus is not liable for injuries that could not have been prevented by the exercise of due care, such as the explosion of a sewer manhole.

Citation:

- Case: City of Joliet v. Seward, 86 Ill. 402 (1877).

Opinions No. 8955 of December 9, 1935, and No. 8403 of May 23, 1934, both to the Chairman of the Committee on Finance discuss the same point as the above opinion.

LIABILITY FOR NEGLIGENT INSPECTION OF SEWERS

(No. 7553—*Chairman, Committee on Finance*—*Jud. G.*—*April 20, 1932*—*2½ pp.*)

The inspection of sewers being a corporate function, the city is liable for the negligence of its employees in so acting.

Citation:

Case: *Chicago v. Seben*, 165 Ill. 379 (1897).

LIABILITY FOR DAMAGES FROM DANGEROUS TREES

(No. 8188—*Commissioner of Public Works*—*C. N.*—*October 14, 1933*—*3½ pp.*)

The city may demand the removal of a tree which is causing damage or is likely to cause damage to property. But this complete control over trees constituting a nuisance does not invariably imply responsibility for damages caused by the trees unless the trees constitute a dangerous obstruction to public thoroughfares and the city receives adequate notice thereof prior to the occurrence of an injury.

Citations:

Cases: *Baker v. Town of Normal*, 81 Ill. 108 (1875-76).
Matthews v. Baraboo, 39 Wis. 674, 677 (1876).
Fitzgerald v. Berlin, 64 Wis. 203 (1885).
Chase v. City of Lowell, 151 Mass. 422 (1890).
Other reference: 7 *McQuillin, Mun. Corp.*, sec. 2970.

LIABILITY FOR FAILING TO REMOVE DECAYING TREE

(No. 8837—*Chairman, Committee on Finance*—*E. L. M.*—*August 8, 1935*—*3 pp.*)

The city is liable for the damage caused by the falling of a decayed tree that stood in the street, as it was negligent in failing to remove the tree upon notification.

Citations:

Cases: *City of Mt. Carmel v. Shaw*, 155 Ill. 37 (1895).
Jones v. City of Greensboro, 124 N. C. 310 (1899).

Opinions No. 7962 of March 8, 1933 and No. 8723 of March 20, 1935, both to the Chairman of the Committee on Finance are in accord with the above opinion.

NOTICE OF DEFECTIVE TREE

(No. 8352—*Chairman, Committee on Finance*—*J. W. G.*—*April 2, 1934*—*2½ pp.*)

The city is not liable for damages sustained by reason of a tree falling on private property unless the claimant can show that the city

authorities had been notified of the condition of the tree prior to its fall, or else such a set of circumstances must be shown so that notice would be implied.

Citations:

- Cases: *Stanton v. Salem*, 145 Mass. 476 (1888).
Cook v. City of Anamosa, 66 Iowa 427 (1885).
Mayor v. Sheffield, 71 U. S. 189 (1866).
Brennan v. City of Streator, 256 Ill. 468 (1912-13).
Jones v. Greensboro, 124 N. C. 310 (1899).
Gubasco v. City of New York, 1 N. Y. S. 215 (1888).

LIABILITY FOR DAMAGE TO SEWERS BY TREE ROOTS

(No. 8491—*Chairman, Committee on Finance*—E. L. M.—August 17, 1934—2½ pp.)

The city is not required to inspect trees beneath the ground and thus is not responsible for damages caused by tree-roots growing into and obstructing a sewer when it had no notice of such condition.

Citations:

- Cases: *Jones v. Greensboro*, 124 N. C. 310 (1899).
Gubasco v. City of New York, 1 N. Y. S. 215 (1888).

C. STATUTORY LIABILITY

LIABILITY FOR DAMAGES CAUSED BY FIRE DEPARTMENT VEHICLES

(No. 7303—*City Attorney*—M. F. M.—November 19, 1931—2 pp.)

A statute making a municipality of the state liable in damages for the negligence of a fireman while driving a fire vehicle is of doubtful constitutionality, since the legislature is without power to select a class of cases and by a special act provide for them a different rule of decision from that which is applicable in other cases, as for example, a policeman driving a police car.

Citations:

- Statute: Cah. '31, 24: 987 (1).
Case: *Otis Elevator Co. v. Industrial Commission*, 302 Ill. 95 (1922).

LIABILITY FOR DAMAGE DURING RIOTS

(No. 7758—*Chairman, Committee on Finance*—S. A. M.—September 26, 1932—2 pp.)

The city is liable for three-fourths of the damages caused to any real or personal property by a mob or riot of twelve or more persons.

Citation:

- Statute: SH '31, 38: 518.

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